

SOLUBLE

ENTERED

F 2302

San Francisco Law Library

436 CITY HALL

No. 162069

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov



5.3011

No. 15195

United States
Court of Appeals
for the Ninth Circuit

JAMES HANNIFIN, Claimant of One Electronic
Pointmaker, Also Known as the JOKER MA-
CHINE, Serial Number X550378,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee;

and

JAMES HANNIFIN, Claimant of One Electronic
Pointmaker, Also Known as the BINGO MA-
CHINE, Serial Number X550518,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

FILE

OCT - 8 1956

PAUL P. O'BRIEN, C
Appeals from the United States District Court for the
District of Montana, Butte Division

No. 15195

United States
Court of Appeals
for the Ninth Circuit

JAMES HANNIFIN, Claimant of One Electronic
Pointmaker, Also Known as the JOKER MA-
CHINE, Serial Number X550378,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee;

and

JAMES HANNIFIN, Claimant of One Electronic
Pointmaker, Also Known as the BINGO MA-
CHINE, Serial Number X550518,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeals from the United States District Court for the
District of Montana, Butte Division**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Libel of Information, Cause No. 502...	3
Amended Libel of Information, Cause No. 503...	6
Answer, Cause No. 502.....	22
Answer, Cause No. 503.....	23
Attorneys, Names and Addresses of, Cause No. 502	1
Attorneys. Names and Addresses of, Cause No. 503	1
Certificate of Clerk.....	121
Claim of Owner, Cause No. 502.....	20
Claim of Owner, Cause No. 503.....	21
Docket Entries, Cause No. 502.....	117
Docket Entries, Cause No. 503.....	119
Findings of Fact and Conclusions of Law.....	25
Judgment and Decree of Condemnation, Cause No. 502	30
Judgment and Decree of Condemnation, Cause No. 503	32
Marshal's Return, Cause No. 502.....	12
Notice of Seizure.....	13

INDEX	PAGE
Marshal's Return, Cause No. 503.....	16
Notice of Seizure.....	17
Monition, Cause No. 502.....	8
Monition, Cause No. 503.....	10
Notice of Appeal, Cause No. 502.....	35
Notice of Appeal, Cause No. 503.....	36
Statement of Points, Causes Nos. 502 and 503 (USDC)	37
Transcript of Evidence.....	40
Motion to Dismiss.....	84
Motion to Dismiss, Renewal of.....	114
Witnesses, Claimant's:	
Hannifin, James J.	
—direct	86
—cross	86
McManus, Bernard T.	
—direct	88
—cross	99
—redirect	110
—recross	112
Witnesses. Libelant's:	
Hutcheson, Kent	
—direct	43
—cross	50

INDEX

PAGE

Witnesses, Libelant's—(Continued):

Massman, Hubert J.

—direct 51

—cross 59

—redirect 59

Nelson, Ole

—direct 60

Tarbox, Glen

—direct 63

—cross 71

—redirect 78

—recross 80

NAMES AND ADDRESSES OF ATTORNEYS

Civil No. 502

KREST CYR,
United States Attorney,
Butte, Montana,
Attorney for Appellee and Libelant.

JOHN M. McCARVEL,
305 Barber-Lydiard Building,
Great Falls, Montana;
EDWIN V. MAGAGNA,
Rock Springs National Bank Building,
Rock Springs, Wyoming,
Attorneys for Appellant and Libelee.

Civil No. 503

KREST CYR,
United States Attorney,
Butte, Montana,
Attorney for Libelant and Appellee.

JOHN M. McCARVEL,
Barber-Lydiard Building,
Great Falls, Montana;
J. D. FREEBOURN,
Butte, Montana;
EDWIN V. MAGAGNA,
Rock Springs, Wyoming,
Attorneys for Appellant and Defendant,
J. J. Hannifin.

In the United States District Court for the District
of Montana, Butte Division

Civil No. 502

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE ELECTRONIC POINTMAKER, Also
Known as the Joker Machine, Serial Number
X550378,

Libelee.

AMENDED LIBEL OF INFORMATION

To the Honorable Judge of the United States Dis-
trict Court for the District of Montana:

Comes now the United States of America, by
Frank M. Kerr, Assistant United States Attorney
for the District of Montana, and shows to the
Court:

1. That the amended libel of information is filed
by the United States of America and prays the
seizure and forfeiture of a certain gambling device,
as hereinafter set forth, in accordance with the
Transportation of Gambling Devices Act. (15
U.S.C., Section 1171, et seq.)

2. That during the year 1955, the Buckley Man-
ufacturing Company knowingly transported an
Electronic Pointmaker, also known as the Joker
Machine, Serial Number X550378, to Butte, in the

State and District of Montana, from Chicago, Illinois.

3. That said Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, was transported in violation of 15 U.S.C., Section 1172, in that said Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, was a gambling device within the meaning of 15 U.S.C., Section 1171, in that it was a machine and mechanical device, an essential part of which is a drum or reel, with insignia thereon, by the operation of which a person may become entitled to receive, as the result of [3*] the application of an element of chance, money and property, when said gambling device was transported to Butte, Montana, from Chicago, Illinois, as aforesaid.

4. That the aforesaid gambling device is located at the Eagle Lounge at Butte, in the State and District of Montana, or elsewhere within the jurisdiction of this Court.

5. That by reason of the foregoing, the aforesaid gambling device is held illegally within the jurisdiction of this Court and is liable to seizure, forfeiture and condemnation, pursuant to the provisions of 15 U.S.C., Section 1177.

Wherefore, libelant prays that process in due form of law according to the course of this Court in cases of admiralty jurisdiction, as well as attachment, issue against the aforesaid gambling de-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

vice; that all persons having any interest therein be cited to appear herein and answer the aforesaid premises: that this Court decree the forfeiture and condemnation of the aforesaid gambling device, and grant libelant the costs of this proceeding against the claimant of the aforesaid gambling device; that the aforesaid article be disposed of as this Court may direct, pursuant to the provision of said Act and that libelant have such other and further relief as the case may require.

Dated this 7th day of December, 1955.

KREST CYR,

United States Attorney for
the District of Montana,

/s/ FRANK M. KERR,

Assistant U. S. Attorney for the District of Montana, Proctors for Libelant, the United States of America, Federal Building, Butte, Montana.

[Endorsed]: Filed December 7, 1955.

In the United States District Court for the District
of Montana, Butte Division

Civil No. 503

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE ELECTRONIC POINTMAKER, Also
Known as the Bingo Machine, Serial Num-
ber X550518,

Libelee.

AMENDED LIBEL OF INFORMATION

To the Honorable Judge of the United States Dis-
trict Court for the District of Montana:

Comes now the United States of America, by
Frank M. Kerr, Assistant United States Attorney
for the District of Montana, and shows to the
Court:

1. That the amended libel of information is filed
by the United States of America and prays the
seizure and forfeiture of a certain gambling device,
as hereinafter set forth, in accordance with the
Transportation of Gambling Devices Act. (15
U.S.C., Section 1171, et seq.)

2. That during the year 1955, the Buckley Man-
ufacturing Company knowingly transported an
Electronic Pointmaker, also known as the Bingo
Machine, Serial Number X550518, to Butte, in the

State and District of Montana, from Chicago, Illinois.

3. That said Electronic Pointmaker, also known as the Bingo Machine, Serial Number X550518, was transported in violation of 15 U.S.C., Section 1172, in that said Electronic Pointmaker, also known as the Bingo Machine, Serial Number X550518, was a gambling device within the meaning of 15 U.S.C., Section 1171, in that it was a machine and mechanical device, an essential part of which is a drum or reel, with insignia thereon, by the operation of which a person may become entitled to receive, as the result of [5] the application of an element of chance, money and property, when said gambling device was transported to Butte, Montana, from Chicago, Illinois, as aforesaid.

4. That the aforesaid gambling device is located at the Eagle Lounge at Butte, in the State and District of Montana, or elsewhere within the jurisdiction of this Court.

5. That by reason of the foregoing, the aforesaid gambling device is held illegally within the jurisdiction of this Court and is liable to seizure, forfeiture and condemnation, pursuant to the provisions of 15 U.S.C., Section 1177.

Wherefore, libelant prays that process in due form of law according to the course of this Court in cases of admiralty jurisdiction, as well as attachment, issue against the aforesaid gambling device; that all persons having any interest therein

be cited to appear herein and answer the aforesaid premises: that this Court decree the forfeiture and condemnation of the aforesaid gambling device, and grant libelant the costs of this proceeding against the claimant of the aforesaid gambling device; that the aforesaid article be disposed of as this Court may direct, pursuant to the provision of said Act and that libelant have such other and further relief as the case may require.

Dated this 7th day of December, 1955.

KREST CYR,

United States Attorney for
the District of Montana,

/s/ FRANK M. KERR,

Assistant United States Attorney for the District
of Montana, Proctors for Libelant, the United
States of America, Federal Building, Butte,
Montana.

[Endorsed]: Filed December 7, 1955.

[Title of District Court and Cause.]

Civil No. 502

MONITION

To Any Special Agent of the Federal Bureau of
Investigation in the District of Montana—
Greetings:

Whereas, a libel of information has been filed in
the United States District Court for the District of
Montana, on the 6th day of December, 1955, by

Frank M. Kerr, Esquire, Assistant United States Attorney, on behalf of the United States of America, against one Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, for breach of the laws of the United States, and in particular for the reasons and causes in the libel of information mentioned, and praying the usual process and monition in that behalf to be made, and that all persons interested may be cited, to answer the premises, and all proceedings being had that the Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, may for the causes in the said libel of information mentioned, be condemned and seized as forfeited, to the use of the United States of America.

You Are Therefore Commanded, to attach the aforesaid gambling device and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be seized, forfeited and condemned pursuant to the prayer of the libel of information, that they be and appear before this Court on the 5th day of January, 1956, at 10:00 a.m. [7] to interpose a claim for the same. And what you shall have done in the premises do you then and there make return thereof together with this writ.

Witness, the Honorable W. D. Murray, Judge, at the City of Butte, Montana, in the District of Montana, this the 6th day of December, 1955, and of

the Independence of the United States of America
the One Hundred and Eightieth.

E. WARREN TOOLE,
Clerk U. S. District Court for
District of Montana,

[Seal] By /s/ HELEN HARSTEAD,
Deputy Clerk.

Return on Monition Attached.

[Endorsed]: Filed December 6, 1955. [8]

[Title of District Court and Cause.]

Civil No. 503

MONITION

To Any Special Agent of the Federal Bureau of
Investigation in the District of Montana—
Greetings:

Whereas, a libel of information has been filed in
the United States District Court for the District of
Montana, on the 6th day of December, 1955, by
Frank M. Kerr, Esquire, Assistant United States
Attorney, on behalf of the United States of Amer-
ica, against One Electronic Pointmaker, also known
as the Bingo Machine, Serial Number X550518, for
breach of laws of the United States, and in particu-
lar for the reasons and causes in the libel of infor-
mation mentioned, and praying the usual process
and monition in that behalf to be made, and that
all persons interested may be cited, to answer the
premises, and all proceedings being had that the

Electronic Pointmaker, also known as the **Bingo Machine**, Serial Number **X550518**, may, for the causes in the said libel of information mentioned, be condemned and seized as forfeited, to the use of the United States of America.

You Are Therefore Commanded, to attach the aforesaid gambling device and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be seized, forfeited and condemned pursuant to the prayer of the libel of information, that they be and appear before this Court on the 5th day of January, 1956, at 10:00 a.m. [10] to interpose a claim for the same. And what you shall have done in the premises do you then and there make return thereof together with this writ.

Witness, the Honorable W. D. Murray, Judge, at the City of Butte, Montana, in the District of Montana, this the 6th day of December, 1955, and of the Independence of the United States of America the one hundred and eightieth.

E. WARREN TOOLE,

Clerk, United States District Court for the District of Montana,

[Seal] By /s/ HELEN HARSTEAD,

Deputy Clerk.

Return on Monition Attached.

[Endorsed]: Filed December 6, 1955. [11]

[Title of District Court and Cause.]

No. 502

MARSHAL'S RETURN

United States of America,
District of Montana—ss.

I hereby certify and return that I received the within Notice of Seizure, Amended Libel of Information on the 13th day of December, 1955, and executed the same, as follows:

That I attached the following-described property, to wit:

Electronic Pointmaker, etc., Serial No.
X550378.

on the 13th day of December, 1955, at Butte, Montana, and on said date appointed custodian thereof;

That I served copies of the Libel of Information, and Notice of Seizure herein on Daniel Hannifin, James Hannifin, Irving Coombe, Libelee, above-named, on the 13th day of December, 1955, at Butte, Montana.

That I caused said Notice of Seizure, setting forth the substance of the Libel of Information herein to be published once a week for three consecutive weeks in the Butte Daily Post, a newspaper of general circulation published at Butte, Montana, at least three weeks prior to January 5, 1956, fixed by order of Court herein, publisher's affidavit

being hereto attached and made a part of this return.

That I posted a copy of said Notice of Seizure in the most public manner at City Hall, Post Office, and Court House, in the City of Butte, Montana, on the 13th day of December, 1955.

The original Notice of Seizure and the receipt of the custodian above-named is attached hereto and made a part of this return.

Dated this 13th day of December, 1955.

Machines stored in U. S. Marshal's Office, Butte, Montana.

/s/ LOUIS O. ALEKSICH,

United States Marshal for
the District of Montana,

By /s/ BERNARD J. REILLY,
Deputy. [13]

[Title of District Court and Cause.]

Civil No. 502

NOTICE OF SEIZURE

Notice Is Hereby Given that an amended libel of information for seizure, forfeiture and condemnation, has been filed by the above-named libelant in the above-entitled Court and cause;

That by order of the Court there has been seized from the Eagle Lounge in Butte, in the State and District of Montana, the following described gambling device, to wit:

One Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378;

That said libelant prays in said libel of information that the above-described property be forfeited and condemned to the United States of America upon the following grounds, to wit:

1. That the amended libel of information is filed by the United States of America and prays the seizure and forfeiture of a certain gambling device, as hereinafter set forth, in accordance with the Transportation of Gambling Devices Act. (15 U.S.C., Section 1171, et seq.)

2. That during the year 1955, the Buckley Manufacturing Company knowingly transported an Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, to Butte, in the State and District of Montana, from Chicago, Illinois.

3. That said Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, was transported in violation of 15 U.S.C., Section 1172, in that said Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, was a gambling [14] device within the meaning of 15 U.S.C., Section 1171, in that it was a machine and mechanical device, an essential part of which is a drum or reel, with insignia thereon, by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, money and property, when said gam-

bling device was transported to Butte, Montana, from Chicago, Illinois, as aforesaid.

4. That the aforesaid gambling device is located at the Eagle Lounge at Butte, in the State and District of Montana, or elsewhere within the jurisdiction of this Court.

5. That by reason of the foregoing, the aforesaid gambling device is held illegally within the jurisdiction of this Court and is liable to seizure, forfeiture and condemnation, pursuant to the provisions of 15 U.S.C., Section 1177.

Notice Is Further Given, That By Order of the Court the libelee herein named and all other persons having or claiming any interest in the aforesaid gambling device seized, or having anything to say why the same should not be condemned and forfeited, appear and file their respective answers, claims and defenses to such libel of information, as amended, for forfeiture and condemnation, setting forth their interest in or claims to said property libeled, with the clerk of the above-named Court at Butte, Montana, on or before the 5th day of January, 1956.

Dated this 9th day of December, 1955.

LOUIS O. ALEKSICH,

United States Marshal for the
District of Montana,

By /s/ BERNARD J. REILLY,
Deputy.

[Endorsed]: Filed December 16, 1955. [15]

[Title of District Court and Cause.]

No. 503

MARSHAL'S RETURN

United States of America,
District of Montana—ss.

I hereby certify and return that I received the within Notice of Seizure, Amended Libel of Information on the 13th day of December, 1955, and executed the same, as follows:

That I attached the following-described property, to wit:

One Electronic Pointmaker, also known as the Bingo Machine, Serial Number X550518; on the 13th day of December, 1955, at Butte, Montana, and on said date appointed custodian thereof;

That I served copies of the Libel of Information, and Notice of Seizure herein on Daniel Hannifin, James Hannifin, Irving Coombe, Libelee, above-named, on the 13th day of December, 1955, at Butte, Montana.

That I caused said Notice of Seizure, setting forth the substance of the Libel of Information herein to be published once a week for three consecutive weeks in the Butte Daily Post, a newspaper of general circulation published at Butte, Montana, at least three weeks prior to January 5, 1956, fixed by order of Court herein, publisher's

affidavit being hereto attached and made a part of this return.

That I posted a copy of said Notice of Seizure in the most public manner at the Post Office, Court House, and City Hall, in the City of Butte, Montana, on the 13th day of December, 1955.

The original Notice of Seizure and the receipt of the custodian above-named is attached hereto and made a part of this return.

Dated this 13th day of December, 1955.

Machines stored in United States Marshal's Office, Butte, Montana.

LOUIS O. ALEKSICH,

United States Marshal for the
District of Montana,

By /s/ BERNARD J. REILLY,
Deputy. [17]

[Title of District Court and Cause.]

Civil No. 503

NOTICE OF SEIZURE

Notice Is Hereby Given that an amended libel of information for seizure, forfeiture and condemnation, has been filed by the above-named libelant in the above-entitled Court and cause;

That by order of the Court there has been seized from the Eagle Lounge in Butte, in the State and District of Montana, the following described gambling device, to wit:

One Electronic Pointmaker, also known as the Bingo Machine, Serial Number X550518.

That said libelant prays in said libel of information that the above-described property be forfeited and condemned to the United States of America upon the following grounds, to wit:

1. That the amended libel of information is filed by the United States of America and prays the seizure and forfeiture of a certain gambling device, as hereinafter set forth, in accordance with the Transportation of Gambling Devices Act. (15 U.S.C., Section 1171, et seq.)

2. That during the year 1955, the Buckley Manufacturing Company knowingly transported an Electronic Pointmaker, also known as the Bingo Machine, Serial Number X550518, to Butte, in the State and District of Montana, from Chicago, Illinois.

3. That said Electronic Pointmaker, also known as the Bingo Machine, Serial Number X550518, was transported in violation of 15 U.S.C., Section 1172, in that said Electronic Pointmaker, also known as the Bingo Machine, Serial Number X550518, was a gambling [18] device within the meaning of 15 U.S.C., Section 1171, in that it was a machine and mechanical device, an essential part of which is a drum or reel, with insignia thereon, by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, money and property, when said gambling

device was transported to Butte, Montana, from Chicago, Illinois, as aforesaid.

4. That the aforesaid gambling device is located at the Eagle Lounge at Butte, in the State and District of Montana, or elsewhere within the jurisdiction of this Court.

5. That by reason of the foregoing, the aforesaid gambling device is held illegally within the jurisdiction of this Court and is liable to seizure, forfeiture and condemnation, pursuant to the provisions of 15 U.S.C., Section 1177.

Notice Is Further Given, That By Order of the Court the libelee herein named and all other persons having or claiming any interest in the aforesaid gambling device seized, or having anything to say why the same should not be condemned and forfeited, appear and file their respective answers, claims and defenses to such libel of information, as amended, for forfeiture and condemnation, setting forth their interest in or claims to said property libeled, with the clerk of the above-named Court at Butte, Montana, on or before the 5th day of January, 1956.

Dated this 12th day of December, 1955.

/s/ LOUIS O. ALEKSICH,

United States Marshal for
the District of Montana,

By /s/ BERNARD J. REILLY,
Deputy.

[Endorsed]: Filed December 16, 1955. [19]

[Title of District Court and Cause.]

Civil No. 502

CLAIM OF OWNER

Comes now James J. Hannifin, owner of the above-named Electronic Pointmaker in the above-entitled cause, and appears and makes claim to the aforesaid Electronic Pointmaker, Serial Number X550378, also known as the Joker Machine, attached by the United States Marshal for the District of Montana under the process of this Court at the instance of the United States of America, and that the person above-named, James J. Hannifin, is the true and bona fide owner of the said Electronic Pointmaker, and that no other person is the owner thereof;

Wherefore, the said James J. Hannifin, prays to defend accordingly.

/s/ JAMES J. HANNIFIN.

Subscribed and sworn to before me this 5th day of January, 1956.

[Seal] /s/ J. D. FREEBOURN,
Notary Public for State of
Montana.

My commission expires on 1/28/58.

[Endorsed]: Filed January 5, 1956. [21]

[Title of District Court and Cause.]

Civil No. 503

CLAIM OF OWNER

Comes now James J. Hannifin, owner of the above-named Electronic Pointmaker in the above-entitled cause, and appears and makes claim to the aforesaid Electronic Pointmaker, Serial Number X550518, also known as the Bingo Machine, attached by the United States Marshal for the District of Montana under the process of this Court at the instance of the United States of America, and that the person above-named, James J. Hannifin, is the true and bona fide owner of the said Electronic Pointmaker, and that no other person is the owner thereof;

Wherefore, the said James J. Hannifin, prays to defend accordingly.

/s/ JAMES J. HANNIFIN.

Subscribed and sworn to before me this 5th day of January, 1956.

[Seal] /s/ J. D. FREEBOURN,
Notary Public for the State
of Montana.

My commission expires on 1/28/58.

[Endorsed]: Filed January 5, 1956. [22]

[Title of District Court and Cause.]

Civil No. 502

ANSWER

Comes now James J. Hannifin, claimant, and for his answer to the Amended Libel of Information of the United States of America against One Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, alleges as follows:

1. Admits the allegations of Paragraph One of the Libel.

2. Admits the allegations of Paragraph Two of the Libel.

3. Denies specifically that said Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, was transported in violation of 15 U.S.C., Section 1172. in that said Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, is not and was not at the time of its seizure and attachment a gambling device within the meaning of Title 15 U.S.C., Section 1171; admits that said Electronic Pointmaker is and was a machine and mechanical device but specifically denies that an essential part of the same is a drum or reel with insignia thereon, and specifically denies that by the operation of the **aforesaid** Electronic Pointmaker a person or any person may become entitled to receive as the result of the application of an element of chance or in any other manner money and property or either when said Elec-

tronic [26] Pointmaker was transported to Butte, Montana, from Chicago, Illinois, or at the time of the seizure and attachment or any other time.

4. Admits that said Electronic Pointmaker was located at the Eagle Lounge in Butte, Montana, in the State and District of Montana, but again specifically denies that said Electronic Pointmaker was or is a gambling device under the provisions of Title 15, U.S.C., Section 1171.

5. Denies the allegations of Paragraph Five of the Libel.

Wherefore, Plaintiff Prays that this Honorable Court will dismiss the libel of information aforesaid and condemn the libelant with costs.

O'CONNELL AND McCARVEL,
JAMES D. FREEBOURN,

By /s/ JERRY J. O'CONNELL,
Proctors for Claimant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed January 5, 1956. [27]

[Title of District Court and Cause.]

Civil No. 503

ANSWER

Comes now James J. Hannifin, Claimant, and for his answer to the Amended Libel of Informa-

tion of the United States of America against One Electronic Pointmaker, also known as the Bingo Machine, Serial Number X550518, alleges as follows:

1. Admits the allegations of Paragraph One of the Libel.

2. Admits the allegations of Paragraph Two of the Libel.

3. Denies specifically that said Electronic Pointmaker, also known as the Bingo Machine, Serial Number X550518, was transported in violation of 15 U.S.C., Section 1172, in that said Electronic Pointmaker, also known as the Bingo Machine, Serial Number X550318, is not and was not at the time of its seizure and attachment a gambling device within the meaning of Title 15 U.S.C., Section 1171; admits that said Electronic Pointmaker is and was a machine and mechanical device but specifically denies that an essential part of the same is a drum or reel with insignia thereon, and specifically denies that by the operation of the aforesaid Electronic Pointmaker a person or any person may become entitled to receive as the result of the application of an element of chance or in any other manner, money or property, or either, when said Electronic [29] Pointmaker was transported to Butte, Montana, from Chicago, Illinois, or at the time of the seizure and attachment or any other time.

4. Admits that said Electronic Pointmaker was located at the Eagle Lounge, in Butte, Montana, in

the State and District of Montana, but again specifically denies that said Electronic Pointmaker was or is a gambling device under the provisions of Title 15 U.S.C., Section 1171.

5. Denies the allegations of Paragraph Five of the Libel.

Wherefore, Plaintiff Prays that this Honorable Court will dismiss the libel of information aforesaid and condemn the libelant with costs.

O'CONNELL and McCARVEL,
JAMES D. FREEBOURN,

By /s/ JERRY J. O'CONNELL,
Proctors for Claimant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed January 5, 1956. [30]

[Title of District Court and Cause.]

Nos. 502 and 503

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The United States of America, having filed a Libel of Information praying for the seizure and condemnation of two Electronic Pointmakers, in individual cases, the same having been seized in Butte, State and District of Montana, by Agents of

the Federal Bureau of Investigation, acting under the authority of the Attorney General.

James J. Hannifin, of Butte, Montana, answered the Libel of Information, alleging ownership of the machines. Claimant Hannifin alleged that the Electronic Pointmaker devices were not gambling devices within the meaning of Title 15 U.S.C., Section 1171. Claimant further admitted that the Electronic Pointmaker devices were and are a machine and mechanical device, but specifically denied that an essential part of the same was a drum or reel with insignia thereon; and further, claimant specifically denied that by the operation of the said Electronic Pointmaker devices a person or any persons may become entitled to receive as a result of the application of the element of chance, or in any other manner, money and property, or either, when said Electronic Pointmakers [33] were transported to Butte, Montana, or at the time of the seizure and attachment or any other time. The claimant admitted to the interstate transportation of the Electronic Pointmaker devices, and prayed the Court to dismiss the Libel of Information filed by the United States of America.

The case was tried before this Court without a jury on January 12, 1956; Mr. Krest Cyr, United States Attorney for the District of Montana; and Mr. Frank M. Kerr, Assistant United States Attorney for the District of Montana, appearing on behalf of the Libelant; and Mr. John M. McCarvel

and Mr. Edwin V. Magagna, appearing on behalf of the claimant.

The parties mutually agreed and stipulated that Civil No. 502 and Civil No. 503 could be tried together, and the evidence adduced as to one Electronic Pointmaker be applied to the other, and from the evidence adduced and the stipulations entered into by counsel, the Court makes the following:

Findings of Fact

I.

That during the year 1955, there was knowingly transported from Chicago, Illinois, to Butte, in the State and District of Montana, the said Electronic Pointmakers, Serials No. X550378 and No. X550518.

II.

That said Electronic Pointmakers, and each of them, were and are a machine and mechanical device.

III.

That there was and is as an essential part of each Electronic Pointmaker, a drum or reel appearing on the face of each, with insignia thereon, consisting of numerals. [34]

IV.

That by the operation of the said Electronic Pointmakers, a person may become entitled to receive, as a result of the application of an element of chance, money.

V.

That at the time of seizure, the said Electronic Pointmakers were located at the Eagle Lounge in Butte, State and District of Montana; that winning combinations on the machines resulted solely from the application of an element of chance, and winnings on the said Electronic Pointmakers at the Eagle Lounge were paid off in cash.

From the foregoing Findings of Fact the Court draws the following

Conclusions of Law

I.

That the Court has jurisdiction of the subject and matter of this proceeding.

II.

That during the year 1955, the libelees herein were knowingly transported in interstate commerce from Chicago, Illinois, to Butte, in the State and District of Montana.

III.

That said Electronic Pointmakers, libelees, were and are gambling devices within the meaning of 15 U.S.C., Section 1171, in that they were and are a machine and mechanical device, an essential part of which is a drum or reel, with insignia thereon, by the operation of which a person may become entitled to receive as a result of the application of an element of chance, money, and that said libelees were gambling devices at the time they were trans-

ported to Butte, Montana, from Chicago, Illinois, as aforesaid.

IV.

That the libelees herein were transported in violation of Title 15, U.S.C., Section 1172. [35]

V.

That the aforesaid libelees are held illegally within the jurisdiction of this Court and are liable to seizure, forfeiture and condemnation, pursuant to the provisions of Title 15, U.S.C., Section 1177.

The United States Attorney is directed to prepare a judgment and submit it to the Court in accordance herewith.

Dated this 2nd day of April, 1956.

/s/ W. D. MURRAY,

United States District Judge.

[Endorsed]: Filed April 2, 1956. [36]

In the United States District Court for the
District of Montana, Butte Division

Civil No. 502

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE ELECTRONIC POINTMAKER, Also
Known as the Joker Machine, Serial Number
X550378,

Libelee.

JUDGMENT AND DECREE OF CONDEMNATION

On the 6th day of December, 1955, a Libel of Information against the above-described One Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, was filed in this Court on behalf of the United States of America by the United States Attorney and Assistant United States Attorney for the District of Montana. The Libel of Information alleged that said Electronic Pointmaker, proceeded against, was shipped in interstate commerce from Chicago, in the State of Illinois, to Butte, in the State and District of Montana, in violation of the Transportation of Gambling Devices Act (15 U.S.C., Section 1171, et seq.). Pursuant to Monition issued by this Court, the Special Agents of the Federal Bureau of Investigation, acting under the authority of the Attorney General of the United States, seized said Electronic

Pointmaker on December 6, 1955. Thereafter, on the 5th day of January, 1956, James Hannifin intervened and filed his claim to said article, and thereafter, on the 12th day of January, 1956, the case was tried before this Court without a jury; Mr. Krest Cyr, United States Attorney for the District of Montana; and Mr. Frank M. Kerr, Assistant United States Attorney for the District of Montana, appearing on behalf of the libelant, and Mr. J. M. McCarvel and Mr. Edwin B. Magagna appearing on behalf of the claimant.

It appearing to the Court that said Electronic Pointmaker was, during the year 1955, knowingly transported from Chicago, Illinois, to Butte, in the State and District of Montana, and was at that [37] time and now is, a machine and mechanical device, and that there was and is, as an essential part of said Electronic Pointmaker, a drum or reel appearing on the face, with insignia thereon, consisting of numerals, and that by the operation of said Electronic Pointmaker a person may become entitled to receive, as a result of the application of an element of chance, money. The Court being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that said Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, under seizure, be forfeited and condemned pursuant to the provisions of Title 15, U.S.C., Section 1177; and

It Is Further Ordered, Adjudged and Decreed that the United States Marshal for the District of

Montana shall destroy said Electronic Pointmaker above-described, now in his custody, pursuant to said Monition; and

It Is Further Ordered, Adjudged and Decreed that the libelant be awarded its costs herein expended.

Done this 6th day of April, 1956.

/s/ W. D. MURRAY,

United States District Judge.

[Endorsed]: Filed and entered April 6, 1956.

In the United States District Court for the District
of Montana, Butte Division

Civil No. 503

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE ELECTRONIC POINTMAKER, Also
Known as the Bingo Machine, Serial Number
X550518,

Libelee.

JUDGMENT AND DECREE OF
CONDEMNATION

On the 6th day of December, 1955, a Libel of Information against the above-described One Elec-

tronic Pointmaker, also known as the Bingo Machine, Serial Number X550518, was filed in this Court on behalf of the United States of America by the United States Attorney and Assistant United States Attorney for the District of Montana. The Libel of Information alleged that said Electronic Pointmaker, proceeded against, was shipped in interstate commerce from Chicago, in the State of Illinois, to Butte, in the State and District of Montana, in violation of the Transportation of Gambling Devices Act (15 U.S.C., Section 1171, et seq.). Pursuant to Monition issued by this Court, the Special Agents of the Federal Bureau of Investigation, acting under the authority of the Attorney General of the United States, seized said Electronic Pointmaker on December 6, 1955. Thereafter, on the 5th day of January, 1956, James Hanfin intervened and filed his claim to said article, and thereafter, on the 12th day of January, 1956, the case was tried before this Court without a jury, Mr. Krest Cyr, United States Attorney for the District of Montana, and Mr. Frank M. Kerr, Assistant United States Attorney for the District of Montana, appearing on behalf of the libelant, and Mr. J. M. McCarvel and Mr. Edwin B. Magagna appearing on behalf of the claimant.

It appearing to the Court that said Electronic Pointmaker was, during the year 1955, knowingly transported from Chicago, Illinois, to Butte, in the State and District of Montana, and was at that [39] time and now is, a machine and mechanical device,

and that there was and is, as an essential part of said Electronic Pointmaker, a drum or reel appearing on the face, with insignia thereon, consisting of numerals, and that by the operation of said Electronic Pointmaker a person may become entitled to receive, as a result of the application of an element of chance, money. The Court being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that said Electronic Pointmaker, also known as the Bingo Machine, Serial Number X550518, under seizure, be forfeited and condemned pursuant to the provisions of Title 15, U.S.C., Section 1177; and

It Is Further Ordered, Adjudged and Decreed that the United States Marshal for the District of Montana shall destroy said Electronic Pointmaker above-described, now in his custody, pursuant to said Monition; and

It Is Further Ordered, Adjudged and Decreed that the libelant be awarded its costs herein expended.

Done this 6th day of April, 1956.

/s/ W. D. MURRAY,

United States District Judge.

[Endorsed]: Filed and entered April 6, 1956.

[Title of District Court and Cause.]

Civil No. 502

NOTICE OF APPEAL

Notice is hereby given that James Hannifin, claimant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that final judgment and decree of condemnation entered in this action on the 6th day of April, 1956, to wit, that judgment and decree of condemnation rendered by the Honorable W. D. Murray, United States District Judge for the District of Montana, Butte Division.

JOHN M. McCARVEL,
Attorney for Appellant and
Claimant,

EDWIN V. MAGAGNA,
Attorney for Appellant and
Claimant,

By /s/ JOHN M. McCARVEL.

[Endorsed]: Filed April 20, 1956. [41]

[Title of District Court and Cause.]

Civil No. 503

NOTICE OF APPEAL

Notice is hereby given that James Hannifin, claimant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that final judgment and decree of condemnation entered in this action on the 6th day of April, 1956, to wit, that judgment and decree of condemnation rendered by the Honorable W. D. Murray, United States District Judge for the District of Montana, Butte Division.

JOHN M. McCARVEL,
Attorney for Appellant and
Claimant,

EDWIN V. MAGAGNA,
Attorney for Appellant and
Claimant,

By /s/ JOHN M. McCARVEL.

[Endorsed]: Filed April 20, 1956. [42]

In the District Court of the United States for the
District of Montana, Butte Division

Civil No. 502

UNITED STATES OF AMERICA,

Libelant and Appellee,

vs.

ONE ELECTRONIC POINTMAKER, Also
Known as the Joker Machine, Serial Number
X550378,

Libelee and Appellant.

Civil No. 503

UNITED STATES OF AMERICA,

Libelant and Appellee,

vs.

ONE ELECTRONIC POINTMAKER, Also
Known as the Bingo Machine, Serial Number
X550518,

Libelee and Appellant.

STATEMENT OF POINTS

The appellant in the above-entitled action sets forth the following points on which he intends to rely on appeal to the United States Court of Appeals for the Ninth Circuit:

The trial Court erred as follows:

1. In holding and deciding that the libelee herein is and was a "gambling device" within the meaning of Title 15, U.S.C., Section 1171.

2. Since the Transportation of Gambling Devices Act (Title 15 U.S.C., Section 1171, et seq.), commonly known as the Johnson Act, being penal in character, was not strictly construed.

3. In holding and deciding that the libelee herein had drums or reels, with insignia thereon, as an essential part of this machine.

4. In holding and deciding that by the operation of this machine, the libelee, that a person may become entitled to receive as a result of the application of an element of chance, money. [45]

5. That the libelee herein was transported in violation of Title 15, U.S.C., Section 1172.

6. In reserving a ruling on claimant's proctor's objection to the introduction of evidence tending to show the libelee machine was used for gambling purposes and then not ruling on said objection.

7. In denying claimant's motion to dismiss at the conclusion of the libelant's case.

8. In not finding that the libelee herein is not a gambling device per se.

9. In not finding that there was no "direct pay-off" from the machines, the libelee herein.

10. In not finding that the machine, the libelee herein, can be used for amusement and recreational purposes.

11. In not finding that no coin can be inserted in the machine, libelee herein, to operate the machine.

12. In not finding that the counter device, or totalizer, was not an essential part of the machine, libelee herein, in the intent of Congress in passing the "Johnson Act," and have nothing to do with the operation of the machine but merely record the score.

13. In not dismissing the amended libel of information as not being within the prohibitive scope of the Johnson Act.

14. In not dismissing the libelant with costs.

/s/ JOHN M. McCARVEL,
Proctor for Claimant and
Appellant;

EDWIN V. MAGAGNA,
Proctor for Claimant and
Appellant.

[Endorsed]: Filed April 20, 1956. [46]

In the United States District Court, District of
Montana, Butte Division

Civil No. 502

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE ELECTRONIC POINTMAKER, Also
Known as the Joker Machine, Serial Number
X550378,

Libelee.

Civil No. 503

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE ELECTRONIC POINTMAKER, Also
Known as the Bingo Machine, Serial Number
X550518,

Libelee.

TRANSCRIPT OF EVIDENCE

The above causes were consolidated and came on for trial before the Hon. W. D. Murray, United States District Judge for the District of Montana, sitting without a jury, at Butte, Montana, on January 12, 1956. The Libelant was represented by its counsel, Mr. Krest Cyr, United States Attorney for the District of Montana, Butte, Montana, and Mr. Frank M. Kerr, Assistant United States Attorney for the District of Montana, Butte, Montana; and

James J. Hannifin, claimant of the above-named Libelees was represented by his counsel, Mr. John M. McCarvel, Great Falls, Montana, and Mr. Edwin V. Magagna, Rock Springs, Wyoming.

Thereupon, the following proceedings were had:

The Court: Numbers 502 and 503, these matters can be heard at one time?

Mr. Cyr: Yes, your Honor, I have talked with Mr. McCarvel, appearing on behalf of Jim Hannifin, one of the claimants, and he has agreed that both actions may be tried at the same time.

The Court: Very well, proceed.

Mr. McCarvel: May it please the Court, at this time I would like to ask the Court and make a motion to the effect that the name of Edwin V. Magagna, of the law firm of Magagna, Galicich and Hamm, of Rock Springs, Wyoming, be entered as counsel in this case. I will tell the Court, Mr. Magagna is presently admitted to the District Court of the District of Wyoming, and, by the way, is President of the Wyoming State Bar Association.

The Court: Very well, for the purposes of this action, Mr. Magagna's name may be entered as of counsel.

Mr. Magagna: Thank you, sir.

Mr. Cyr: Ready to proceed, your Honor?

The Court: Yes. [2*]

Mr. Cyr: I might state to the Court before starting so the issues are defined, this is a civil action brought against these machines for the pur-

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

pose of having them declared gambling devices and destroyed under 1171 and the following sections. The pleadings in the case are such that it is admitted they were transported in interstate commerce; the claimant, Jim Hannifin claims ownership of the machines. However, the answer and claim of the owner, which has been filed, puts in issue two things, one, that it is within the purview of the statute, which provides a prohibition against the interstate transportation of any so-called slot machine, or any other mechanical device, an essential part of which is a drum or reel with insignia on. They deny this is such a machine; also, that part of the statute which says, "which may deliver, as the result of the application of any element of chance any money or property." They have denied this is a machine which will be or was used under those circumstances, so, as we see it, those are the two issues in these cases, the other matters having been admitted, and we have no proof as to interstate transportation at this time.

The Court: Is that as you understand it?

Mr. McCarvel: That is substantially correct, your Honor.

The Court: Very well, proceed.

Mr. Cyr: I would like to know so I do not be surprised, he says "substantially". [3]

Mr. McCarvel: We don't deny these machines have been transported interstate.

The Court: Very well, proceed.

KENT HUTCHESON

called as a witness on behalf of Libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cyr:

Q. Will you state your name, please?

A. My name is Kent Hutcheson.

Q. Your occupation and residence, please?

A. I am a Special Agent with the Federal Bureau of Investigation. I reside at 518 West Park in Butte, Montana.

(Inaudible discussion between counsel.)

Mr. McCarvel: Your Honor, I am just asking that the machine and the remote control unit be separately identified as exhibits so the record will adequately show which we are talking about.

The Court: They will have to be, I suppose.

Mr. Cyr: Your Honor, we don't know whether they are separate parts or not. We picked them up as one, they are attached as they were. They can take them apart, there are thousands of parts in this.

The Court: I don't understand you. I thought you said you wanted the two machines themselves identified separately. [4]

Mr. Magagna: As the witnesses go on, part of the time they will be testifying about this phase, and part of the time, that phase. Unless you have them identified in the record, you don't know which they are talking about. We had that happen in a

(Testimony of Kent Hutcheson.)

case in Wyoming. At least, if your are going to mark this (indicating) Exhibit 1, mark the other part Exhibit 1-A, so we can tell what they are discussing.

The Court: Yes.

Mr. Cyr: The remote control device only?

The Court: Yes.

Mr. Magagna: Yes.

Q. These machines which have been marked Plaintiff's Exhibit 1, Plaintiff's Exhibit 1-A and Plaintiff's Exhibit 2 and Plaintiff's Exhibit 2-A, have you seen those machines before?

A. Yes.

Q. And were you the agent who took them into your possession? A. I was.

Q. When and where was that?

A. That was on December 6, 1955, in the afternoon. I seized those machines at the Eagle Lounge, at 26 West Granite.

Q. Had you, prior to that time, seen any of these machines in Butte? A. I have.

Q. When was the first time you saw machines of this kind? A. June 30th, 1955. [5]

Q. Where was that?

A. In Butte, Montana.

Q. Where, specifically, in Butte?

A. I saw five machines at Lloyd's on South Montana; I saw one machine in the Rose Garden on South Montana; I saw one machine at the It Club in Rocker; and one machine at the Leaky Roof Tavern at the Nistler Junction.

(Testimony of Kent Hutcheson.)

Q. Do you know whether or not——

A. Excuse me, sir, I forgot two machines. I saw two other machines in the possession of Iva Kincaid.

Q. Were those machines in a public establishment?

A. She had them in her personal possession at Unit 5 in Eddy's Motel on South Montana.

Q. They were not in a bar?

A. They were not in operation.

Q. All the others were in bars?

A. Yes, sir, the others were located in bars or places of business.

Q. Were all these machines other than—strike that. Do you know who owned all these machines with the exception of the Kincaid machines?

A. Well, James Hannifin told me he and his two brothers, Danny and Phil, had paid the freight on these machines from the Buckley Manufacturing Company in Chicago, and led me to believe the machines were actually in his custody in Butte, [6] Montana.

Q. Do you know whether or not all those machines which were in these public places and on which Hannifin paid the freight were used as gambling devices?

Mr. McCarvel: To which we object, your Honor, on the ground and for the reason it calls for a conclusion of the witness in reference to these machines, that it has no probative value, that it is

(Testimony of Kent Hutcheson.)

entirely irrelevant, incompetent and immaterial in reference to the hearing in this case.

Mr. Cyr: Your Honor, I have asked him if he knew. The only answer to that is yes or no, he does or does not know.

The Court: He can tell us what he knows. The objection is sustained to the question itself.

Q. Did you have any conversation with Mr. Hannifin on the 30th of June with reference to all of these machines? A. I did.

Q. Where was that conversation held?

A. It was in a Chevrolet carryall truck located right outside of his home, the south side of his home located at 15 South Excelsior here in Butte.

Q. Who else was present?

A. No one except Mr. Hannifin and I.

Q. What else was said, with reference to these machines being gambling devices or anything?

A. Mr. Hannifin stated to me that all the machines, except [7] two located in the Elks' Club, which I never saw, all the machines except those located in the Elks' Club were being used as gambling devices.

Q. Now, when you seized these machines at the Eagles' Lounge, can you describe the interior of the Eagles' Lounge and where the machines were located?

A. The Eagles' Lounge is on the south side of Granite Avenue West, 26 West Granite here in Butte. As you enter the door, there is an office just immediately to the right where Mr. Irving Coombs,

(Testimony of Kent Hutcheson.)

who is Secretary of the Eagles' Lounge has his office; on the right farther down from this office is a bar that I would say was approximately 25 feet long. To the left of the door as you enter, there is a partition-like arrangement which, when you walk back almost to the end of the bar, you can turn and look to your left, and there is a slightly enclosed room—I don't recall it had a door, I don't believe it did—inside of what would look like a coat closet. These two machines were located there. The two remote control boxes, Exhibit 1-A and 2-A were located behind the bar, and Exhibit 2-A and 1-A were connected with Exhibit 2 and Exhibit 1 by those cables that you see running under the floor through the basement.

Q. And were connected to the machines?

A. And were connected to the machines. They were operable at the time I first saw them. [8]

Q. Were the faces of the machines lighted at that time? A. Yes, sir.

Q. Was anybody in the bar playing the machines?

A. No one was playing them at the time I seized them.

Q. Anybody playing them prior to that time?

A. Mr. Al Laforest, who is, I believe, bartender at the Eagles' Lounge in the evening, played the machines on the first occasion I was in there that afternoon.

Q. Before the seizure took place?

A. Before the seizure took place. I say he

(Testimony of Kent Hutcheson.)

played those machines. He played the Joker machine, he did not play the Bingo machine.

Q. By the Joker Machine, you refer to?

A. Exhibit 1.

Q. Exhibit 2 is described as what?

A. As the Bingo machine.

Q. I don't know whether it is specific in the record. Exhibit 1-A is the remote control device connected with Exhibit 1, is that correct?

A. Correct.

Q. Exhibit 2-A is the remote control device and black box which was connected to Exhibit 2?

A. As you will note, there is an exhibit on the top of 2-A which says in red letters on a white card "Bingo", indicating it is connected to the Bingo device. [9]

Mr. Cyr: We will offer in evidence Plaintiff's Exhibits 1, 1-A, Plaintiff's Exhibit 2 and Plaintiff's Exhibit 2-A.

Mr. McCarvel: To which we object, your Honor, upon the ground and for the reason a proper foundation hasn't been laid for their introduction.

The Court: In what manner is the foundation lacking?

Mr. McCarvel: That it hasn't been adequately described where the Eagles' Lounge is located; on the ground and for the reason further that this witness hasn't been properly qualified; on the ground and for the reason that the exact location of the machines has not been established; it has not been

(Testimony of Kent Hutcheson.)

established as to the time of day at which the machines were seized.

The Court: In what way hasn't he been qualified? Make your objection specific.

Mr. McCarvel: All he has testified——

The Court: Qualified as to what?

Mr. McCarvel: Pardon.

The Court: You make the objection that the witness is not qualified. Qualified as to what?

Mr. McCarvel: As to his capacity as Special Agent for the FBI.

The Court: The objections are overruled. They are admitted.

(Plaintiff's Exhibits 1 and 1-A, being respectively the Joker device and the remote control box connected thereto, and Plaintiff's Exhibits 2 and 2-A, [10] being, respectively, the Bingo device and the remote control box connected thereto, were here received in evidence over objection, and the same are in the possession of the Clerk of this Court.)

Q. At the time you seized these machines. did you observe any numbers on them purporting to be serial numbers or anything of that kind?

A. Yes, I identified the machines by number and where they were located. The Joker device there has Number X550378 stamped on the wood base at the rear.

Q. That is Plaintiff's Exhibit 1?

A. That is Plaintiff's Exhibit 1.

(Testimony of Kent Hutcheson.)

Q. Now, Plaintiff's Exhibit 2?

A. That is the Bingo device, and on the rear stamped into the wood of that is number X550518. There are no serial numbers—no serial numbers were extracted from Exhibit 2-A and Exhibit 1-A.

Q. Yes. I recall that you stated the location of the Eagle Lounge. Will you tell us now where the Eagle Lounge is?

The Court: 26 West Granite, he said.

Mr. Cyr: I wasn't sure, your Honor. All right, you may examine.

Cross-Examination

By Mr. McCarvel:

Q. Who ordered you to seize these [11] machines?

A. The United States Attorney caused a libel of information to be issued. A monition was issued me directing Special Agents of the Federal Bureau of Investigation to seize these two devices, Exhibits 1 and 1-A and Exhibits 2 and 2-A.

Q. How long have you been in this area?

A. I have been in this area since December 29, 1955, excuse me, pardon, December 29, 1954.

Mr. McCarvel: That is all.

The Court: Call the next witness.

(Witness excused.)

HUBERT J. MASSMAN

called as a witness on behalf of Libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cyr:

Q. Would you state your name, residence and occupation, please?

A. Hubert J. Massman, 902 North Rodney, Helena, Montana, Assistant Attorney General, State of Montana.

Q. How long have you occupied the position of Assistant Attorney General of the State of Montana? A. Approximately three years.

Q. That has been continuous?

A. Yes. [12]

Q. I call your attention to what has been marked as Plaintiff's Exhibits 1, 1-A, Plaintiff's Exhibit 2 and Plaintiff's Exhibit 2-A. Have you had occasion to see machines of that same kind in Butte, Montana, within the past six months? A. I have.

Q. Where did you see them?

A. I saw machines of that type at the Leaky Roof Tavern, the Highway Inn, the It Club, those three establishments are west of Butte on U. S. Highway 10; at Lloyd's of Butte——

Mr. Magagna: I don't want to be objectionable, but I believe the machines in issue are these two machines. I can't follow this line of testimony, the wandering around talking about the whole State of Montana. I object to the testimony unless he identifies these machines, or unless he says he saw similar

(Testimony of Hubert J. Massman.)

machines, but I don't follow the trend of this testimony.

The Court: What is the purpose?

Mr. Cyr: It is offered to prove a search was made in the City of Butte on these machines. Every one in operation was viewed by this witness and either played by him or a fellow accompanying him in his presence; that he paid a consideration for an opportunity to play them; he was paid off over the bar with money after playing them.

The Court: That is some place else. [13]

Mr. Cyr: Except, your Honor, they have stated that these machines, they specifically deny "by the operation of the aforesaid Electronic Pointmaker a person or any person may become entitled to receive as the result of the application of an element of chance or in any other manner, money or property." We will show this as general proof as to this type machine, not specifically these machines, but it is the machine itself which is here being libeled. Other machines of the same kind, used for the same purpose uniformly and generally, we submit, is evidence of the character and nature and purpose for which these machines are used.

Mr. Magagna: If the Court please, this gentleman gets up and testifies he has been all over the State of Montana and there has been gambling in the State of Montana. Following it from that point, I don't think he has connected it with these machines aside from the general proposition of saying there had been found similar machines. When he

(Testimony of Hubert J. Massman.)

gets on and starts listing them, I don't see they have anything to do with these machines. It would have to be testimony about these machines. Theoretically, you could prove there were 400 other machines. If you proved the 400 and used for a specific purpose and failed to prove these two were, your libel would fail, so I can't follow your proof on this having any advantage whatever in this case.

Mr. Cyr: Your Honor, I don't agree with that. If the [14] device is a mechanical device within the purview of the statute, whether or not it was used for that purpose, it is within the statute.

Mr. McCarvel: Why is testimony available at all? The fact it is used or not doesn't bring it in or out of the purview of the statute. That is our argument, so testimony as to other machines used for that purpose is not material. You, from your own statement, have admitted that if it comes within the purview of the statute, that is what our issue is, not whether it was used for gambling or not.

Mr. Cyr: Your Honor, our position is it looks like a duck, it sounds like a duck, flies like a duck, quacks like a duck, it is a duck. We will show the other machines observed are gambling devices. We will show later these two machines were similarly used.

The Court: Objection overruled.

Q. Continue, please.

A. I observed machines at Lloyd's of Butte, the Vegas Club in Meaderville, and at the Red Rooster Club on Harrison Avenue here in Butte.

(Testimony of Hubert J. Massman.)

Q. Now, were the machines in each of those places the same as either Exhibit 1 or Exhibit 2?

A. Yes, in every respect, they were one or the other kind.

Mr. Magagna: I presume without having to jump up continually to object we can have it understood our objection [15] goes to this entire line of questioning?

The Court: Yes.

Q. Who was with you at that time?

A. Emmett T. Walsh.

Q. What is his profession or occupation?

A. He is also an Assistant Attorney General of the State of Montana.

Q. And when was this, when did you visit these places?

A. On the nights of August 5th and 6th, 1955, and on the nights of August 12 and 13th, 1955.

Q. Now, at each of these places, would you state what you did with relation to these machines, either you or Emmett Walsh in your presence?

A. In each establishment, we found the machine located some distance from the cash register at the bar, the machine which we will designate as Exhibit 1 or 2; and the remote control boxes you find as 1-A or 2-A would be very close to the cash register behind the bar. I would go up to the bartender and put some money on the counter, and the bartender would pick up the money, and he would tell us which machine we were to play—

Mr. McCarvel: Just a minute, now, I would like

(Testimony of Hubert J. Massman.)

to make an objection for the record at this time that this charge is laid under Title 15 of the United States Codes, Section 1171, and it is charged herein that these are gambling devices, and [16] that they were transported in interstate commerce. Now, we object to any testimony with reference to how these machines were used in reference to gambling, because our position is that they are not gambling devices as such. The fact they were used for gambling doesn't in any way tend to prove they are, it has no probative value at all that the machine itself is a gambling device. A deck of cards could be used as a gambling device, a flip of a coin could be a gambling device. We object to any testimony in reference to any evidence as to how this particular machine was used as a gambling device. The Government has to prove here that this machine itself is a gambling device, and not how it was used.

The Court: I take it what the Government is attempting to show is the use to which this machine can be put because another one similar to it has been used in a particular manner. I will reserve ruling on your objection, because it no doubt is going to involve some briefing with reference to the matter, and I don't know the answer at this point. In any event, I will reserve ruling on your objection, and you can proceed with the evidence.

Q. Would you proceed?

A. The bartender would take the money we gave him, and, as an example, if we were playing a machine at a nickel a play and we gave him a

(Testimony of Hubert J. Massman.)

dollar, he would take the dollar and push the button on what is defined as Exhibit 1-A or 2-A, [17] depending upon which machine was in use. When he would press the button, there would be a clicking sound, and those reels which appear somewhat like a speedometer would click up to the position where they would read "20." We would then go over to Exhibit 1 or 2, and the same reels on the machines would read "20." The next step would be to press the yellow button up at the upper left-hand—right-hand, as you are facing from the machine—corner of the machine, and when that button was pressed——

Q. You are referring now to Plaintiff's Exhibit 1 or 2, the machine itself?

A. Yes. Upon pressing that button, you could then pull the lever on the machine. When the lever was pulled, there would be a whirling, clicking sound, and lights would flicker on the various numbers or fruit or pictures on the face of the machine, and it would finally come to rest. As an example, with Exhibit 1, the Joker machine, we will assume that in the first column, a cherry remained lighted, and in the second column a cherry remained lighted, and in the third column some other fruit. If you will observe the face of the machine, stamped in the metal on the face, it has two cherries and a few dots, then "5," the numeral "5."

Q. You are referring to Plaintiff's Exhibit 1 now?

A. Yes, and when it stopped with those two cherries lighted, the speedometer reel device would

(Testimony of Hubert J. Massman.)

then click. Upon pulling [18] the handle, it would have dropped from "20" to "19." When it come to rest on two cherries, you would have five clicks, and it would come up to read "24."

Q. You are referring to the three white reels on the face of the machine behind the glass panel toward the middle part of the machine?

A. Yes, it would then read "24." If you didn't have a winning combination, that same panel would just show "19."

Q. It would show one less as the result of pulling the handle?

A. It would show one less as the result of pulling the handle. That play would then be completed, and you could commence a second play by pressing the yellow button in the upper left-hand corner and pulling the handle. I observed other people playing the machine in that manner, and I played it in that manner in every establishment; and in every instance with either machine, upon concluding play, I arranged to have something left showing on the reels that we have mentioned before.

Q. On the face of the machine?

A. On the face of the machine, and in each instance the bartender would pay for those numerals in the same amount I had paid to play the machine in the beginning.

Q. Was that true whether the amount exceeded—I believe you said you played 20. If the number of games on the face of [19] the machine exceeded 20,

(Testimony of Hubert J. Massman.)

would he pay you the number on the face of the machine?

A. Yes. As an example, where the machine, on the first play I won five plays, and it read "24," he would pay off \$1.20.

Q. That was true in all instances?

A. That was true of every machine and in every establishment we visited.

Q. Did you observe whether or not there was a connection between the reels and drums which appear on the face of the remote control devices which are marked Plaintiff's Exhibit 1-A and Plaintiff's Exhibit 2-A, and the reels which appear on the face of the slot machines?

A. Yes, in every instance, you could see a cable running between, and in every instance when he pressed the button of the remote control device, changing the reading on the cylinders on that device, a corresponding change was made on Exhibits 1 and 2.

Q. That is, the tally on each of those, 1-A and 1, would correspond at all times?

A. Yes, they were synchronized.

Q. I believe you stated 1-A and 2-A were always located behind the bar? A. Yes.

Q. And accessible to and under the control of the bartender [20] of the establishment?

A. Yes.

Q. Did you at that time go to the Eagles' Lounge? A. No.

Mr. Cyr: You may examine.

(Testimony of Hubert J. Massman.)

Cross-Examination

By Mr. McCarvel:

Q. Mr. Massman, at the time you made your investigation with Emmett Walsh, you were in the employ of and acting for the Attorney General of the State of Montana, is that right? A. Yes.

Q. And you went there at his instance and request, is that right? A. Yes.

Mr. McCarvel: That is all.

Redirect Examination

By Mr. Cyr:

Q. In that connection, did you seize some of the machines of the same kind? A. Yes.

Q. Where was that?

A. Lloyd's of Butte, we seized four machines of this type machine. [21]

Q. What was done with those machines?

A. They were destroyed publicly by order of District Judge McClernan.

Q. In Butte?

A. In Butte, Montana. I don't just know the date, I could look it up.

Mr. Cyr: We would ask the Court to take judicial notice of the decision of Judge McClernan in that case. Do you have it with you?

The Court: I don't take judicial notice of it; I think this is immaterial.

(Testimony of Hubert J. Massman.)

Mr. Cyr: I ask the Court to take judicial notice——

The Court: I think the whole thing is immaterial that he seized four machines and investigated them and Judge McClernan ordered them destroyed. I don't take judicial notice of it, and that is all immaterial to this matter, in any event.

Mr. Cyr: That is all.

(Witness excused.)

OLE NELSON

called as a witness on behalf of Libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cyr:

Q. Would you state your name, please, sir? [22]

A. Ole Nelson.

Q. Where do you live, Mr. Nelson?

A. 22 North Idaho.

Q. Where are you employed?

A. I am not employed right now.

Q. Referring to the 6th of December, 1955, where were you employed?

A. Tending bar at the Eagles' Lounge.

Q. Eagles' Lounge in Butte? A. Yes, sir.

Q. That is at 26 West Granite?

A. Yes, sir.

Q. Were you present at the time these machines were in the Eagles' Lounge? A. I was.

(Testimony of Ole Nelson.)

Q. And during the time you were tending bar, did any patrons of the Eagles' Lounge play these machines? A. No, sir, not at that time, no.

Q. Well, at any time?

A. Well, our machines used to play a little every once in awhile, but we had very little play on them.

Q. During the time you were acting as bartender at the Eagles' Lounge, were the machines ever played by any patrons?

A. Yes, they were, by Eagles.

Q. Did they pay you some money to play these machines while [23] you were bartender?

A. They would pay me and play it just a little while, and a few times they would pay off and they got money back, what they put in.

Q. If the number of games exceeded the amount they had paid, you would pay them that amount, would you not?

A. They would generally play them over again. They would get off.

Mr. McCarvel: Without interrupting too much, we ask that the objection we made in reference to any gambling that this machine was used for go to all of the questions asked in that connection, the fact that the machine was used as a gambling device.

The Court: Yes, you made that objection some time ago. I have reserved ruling on that, and I will consider it when you file a brief with the Court, but the Court will receive evidence in the meantime, under the reserved ruling, that the machine was actually used as a gambling machine.

(Testimony of Ole Nelson.)

Mr. McCarvel: We didn't want to have to jump up each time.

The Court: You don't have to, and I will give you an opportunity to advise me with reference to the point.

Q. How much did it cost, Mr. Nelson, for each play on this machine? A. Five cents. [24]

Q. And assume for a moment——

The Court: On this machine—which machine?

Q. On this machine, Exhibit 1. If I wished to play this and you were the man tending bar at the time, and I would give you \$1.00, how would you give me the right to play that machine?

A. Well, we would push the light on Exhibit 2-A. I guess.

Q. You are referring to these black boxes marked 1-A and 2-A? A. Yes, sir.

Q. You would push the button on the right, is that correct? A. Yes, sir.

Q. Which says "Start"? A. Yes.

Q. Would you push it until it registered 20 games? A. Yes, sir.

The Court: Or 21.

Q. 21, I am not skilled in this, your Honor, and then would that entitle the man to pull the handle 21 times, is that correct? A. Yes, sir.

Q. Then, when he had finished playing, you would pay him a nickel for each one of these that would appear on the face of Exhibit 1-A or 2-A?

A. If he had any coming, yes; most of the time he wouldn't. [25]

(Testimony of Ole Nelson.)

Q. Most of the time he lost?

A. Most of the time he played what he had coming.

The Court: Let me just ask a question about the operation of this. After a particular patron finishes play and the figures "21" appear, then how do you clear the machine for the next patron to play?

A. If there is any on it, why you just push the next button.

The Court: What is that?

A. If there is anything on it, you would push the next button.

The Court: The one on the left of Exhibit 1-A?

A. That clears it.

The Court: That clears it.

(U. S. Attorney demonstrates on machine Exhibit 1-A.)

The Court: I see.

Mr. Cyr: You may examine.

Mr. McCarvel: No questions.

(Witness excused.)

GLEN TARBOX

called as a witness on behalf of Libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cyr: [26]

Q. State your name, please.

A. Glen Tarbox.

(Testimony of Glen Tarbox.)

Q. Where do you reside, Mr. Tarbox?

A. 102 East Central, Missoula, Montana.

Q. How long have you resided in Missoula?

A. The last time since 1937.

Q. What is your occupation presently in Missoula, Montana?

A. I am part owner of a radio and television repair shop.

Q. Prior to entering into that occupation, what was your occupation?

A. I was one of the owners of an automatic phonograph company.

Q. How long were you engaged in that business?

A. From 1937 to 1951, I believe, not including a time during the war. I wasn't there during the war.

Q. During that time did you have occasion to become acquainted with the working mechanisms of slot machines and pin ball machines?

A. I did.

Q. Did you, as part of your occupation, during that period of time, repair and take care of the maintenance and operation of those machines?

A. I did.

Q. How many years would you say you spent in that business?

A. In the coin machine business as a whole? [27]

Q. Yes.

A. It would be 1937 to 1952, with about two years out; it would be about 13 years, I believe.

Q. Just for the information of the Court, what

(Testimony of Glen Tarbox.)

is the workings of a pin ball machine, how does it operate, is it electrical? A. Yes, strictly.

Q. What type system does it have in it?

Mr. Magagna: I wish to object to any testimony with respect to pin ball machines. I can't follow the relevancy of pin ball machines in this case.

The Court: Just to show he is qualified with electrically operated machines.

Mr. Magagna: That is fine. I presume he knows how the electric phonograph works. Are you going to have him testify as to the inside workings of a phonograph?

The Court: Just generally, that he has had experience with electrical——

Mr. Cyr: Yes.

Mr. Magagna: I didn't object until you started testifying as to the inside workings of a pin ball machine.

Mr. Cyr: In that regard, he would testify it is an electrical relay system, which is the same system that is here used.

The Court: You may proceed. [28]

Q. Is that right? A. Yes.

Q. Did you, during the same time, have occasion to repair slot machines which were mechanically operated? A. Yes, sir.

Q. For the benefit of the Court, would you remove from Plaintiff's Exhibit 1 the working mechanism of that machine?

(Witness does as requested.)

(Testimony of Glen Tarbox.)

Q. Now, you have removed from the machine the metal portion on a base plate on which appears the words "Electronic Pointmaker"; is that right?

A. Yes.

Q. That portion which you have removed, can that be operated mechanically, can you make the reels on that spin? A. Yes.

Q. Would you illustrate to the Court how that is done? Do you want a handkerchief?

(Witness operates machine portion which he has removed.)

Q. Now, does that portion of the machine operate substantially in the same manner as the slot machines operated?

A. The mechanical part; yes.

Q. Now, what remains in the hull of the machine which has been marked as Plaintiff's Exhibit 1? A. Any specified part? [29]

Q. In the operation of the machine as a complete unit, what is there remaining in the machine?

A. Well, there is a push button, to start with.

Q. What is the purpose of the push button?

A. To start the relays so you can pull the handle.

Q. You refer to the yellow button which appears at the top of the machine? A. Yes.

Q. What else is there?

A. There is wires and connectors which connects the motor, plugs, relays.

Q. What do those wires operate? You are re-

(Testimony of Glen Tarbox.)

ferring to the portions on the back of the glass portion with the emblems on it?

A. Most of it would be to turn off and on the light globes behind the counter.

Q. With reference to the drums and reels which appear with numbers at the bottom, are those electrically operated also? A. Yes.

Q. With those three things—the machine is mechanical except for those three things; is that correct, in its operation?

A. No—including this as one; yes.

Q. What?

A. Including this section as one (indicating).

Q. That is, the electrical portion of the machine operates [30] the three things which you have described; is that correct? A. Correct.

Q. Are those things essential to the operation of this machine as a complete unit?

A. With this particular machine; yes.

Q. Just for the record, can you explain the relationship between this mechanical unit which has been removed from the hull of Plaintiff's Exhibit 1, how it operates with reference to the lights on here and the drums or reels which appear at the bottom? What happens when the handle is pulled?

A. Well, you drop a coin which releases the handle——

Q. You said you drop a coin?

A. I beg your pardon. You push the button, which allows you to pull the handle, which disen-

(Testimony of Glen Tarbox.)

gages your drive arm and allows your reels to spin——

Q. In that connection, what controls the time of spinning of these wheels?

A. There is what they call a clock. Every time you pull the handle, it is wound up, as you call it, and when it runs down in a certain period, it locks the wheel.

Q. During that interim, are these wheels free wheeling? A. Yes.

Q. Nothing other than friction to control the speed at which they turn? A. Yes. [31]

Q. The clock which you refer to, you say it is wound up, is that controlled by a spring?

A. Yes.

Q. And that spring has uniform tension no matter how you pull the handle; is that correct?

A. Approximately; yes.

Q. After you have pulled the handle, then what happens?

A. The wheels spin until they are stopped by the clock, and they are locked by some arms which align these in certain positions.

Q. You are referring to the discs which appear on there?

A. Yes; and on the discs are certain electrical points which light up your symbols on your machine.

Q. On the face of the machine?

A. Yes. If the right combination is gotten, it records.

(Testimony of Glen Tarbox.)

Q. Where does that record?

A. On the meter.

Q. That is the reels or drums which appear on the bottom of the face of the machine?

A. These (indicating).

Q. So that is connected with the operation of the machine, the lights on the face of the machine, and the operation of the mechanical portion of the machine?

A. Yes.

Q. The counting device? [32]

A. Yes, sir.

Q. With reference to what has been marked Plaintiff's Exhibit 1-A, can you state to the Court—strike that. In the event that no game is won, does it still, the pulling of the handle and the operation of the mechanical device, does it still affect the movement of the drums and reels which appear on the face of the machine showing the number of games?

A. If there was numbers on it; yes.

Q. It would decrease it by one if there was no win is that right?

A. Right.

Q. The black boxes which have been marked Exhibits 1-A and 2-A, will you state to the Court what connection there is between those and this machine?

A. They are a recording mechanism to more or less correspond with this one here (indicating).

Q. You are referring to Plaintiff's Exhibit 1?

A. Yes.

Q. Or Exhibit 2?

A. Yes.

Q. Is that also the source of the electrical power

(Testimony of Glen Tarbox.)

for the operation of this machine? A. Yes.

Q. In other words, the machine cannot be operated except by the use of these black boxes, 1-A or 2-A; is that correct? [33]

A. If it is operated right; yes.

Q. Whoever operates this portion of it would have to, through some method, start the control by tallying some games on there, which would register on the machine?

A. If there weren't any on it; yes.

Q. Is there any other controlling device on this other than the handle controlling the speed of these reels which appear inside the machine and make electrical contact controlling the lighting of the insignia on front of the machine?

A. Say that again, please?

Q. Is there any thing other than the handle which controls the speed of the operation of these? (Indicating.) A. Yes.

Q. What?

A. There is a spring and what they call a kicker.

Q. Are both of those spring controlled?

A. Well, the spring naturally is the control factor on the kicker; yes.

Q. On the kicker; and also on the clock?

A. There is two different springs.

Q. Would you explain to the Court which of the springs controls the kicker on this?

A. It is on the mechanism; you pull it down.

(Testimony of Glen Tarbox.)

Q. It is the spring which is attached to the arm on the side. Which spring is it now? [34]

A. It is underneath here (indicating). It hits these notches and kicks it.

Q. It is the elongated spring inside the machine immediately under the three reels which are notched on the extreme right of the mechanical part?

A. Yes.

Q. When you push that—would you explain to the Court how that releases the kicker when you pull the handle?

A. You pull the handle down, and it allows it to ride over an arm, and when this arm goes over the top of the arm, it allows it to kick, and——

Q. That kick is the result of the spring being contracted, which is stretched by the pulling of the handle? A. Right.

Q. And the same is true of the timer, which is also extended by pulling the handle?

A. Right.

Q. That is the mechanism that operates the reels of the machine; is that true? A. Right.

Mr. Cyr: You may examine.

Cross-Examination

By Mr. Magagna:

Q. Now, as I understand, you have testified you have done [35] considerable work on slot machines for repair purposes? A. Yes.

Q. You were explaining some of the similarities

(Testimony of Glen Tarbox.)

between the two. Explain to the Court what the differences are between this unit as assembled and the slot machines you have worked on? What would you say were the principal differences?

A. The wheels are on your mechanism on the right, there is no drums on it, there is no numbers on it—you mean the difference between this and a slot machine? You want me to go into a slot machine?

Q. Are there any main differences?

A. For one thing, a slot machine——

Q. Isn't one thing a slot machine had a slot for a coin?

A. Right, and a coin-pay-out, and was mechanically operated. This one is partly mechanical and partly electrical.

Q. In that connection, with the slot machines you have worked on, did any of them have a counter device similar to this one? A. No.

Q. That counter device has not been used in slot machines? A. I have never seen one.

Q. Now, with reference to these plates here that turn around, are there any markings or insignia on those? A. I didn't see any.

Q. Now, what markings or insignia were there on the reels [36] or drums used in the slot machines?

A. You mean on the face of the drums, you mean?

Q. On the reels and drums of the slot machines, what insignia did you find on that type machine?

(Testimony of Glen Tarbox.)

A. They varied, they had fruit symbols and bells.

Q. With reference to the reels or drums you saw in slot machines that had insignia thereon, are there any of that type of reels or drums in this assembly?

A. The large drums in the slot machine? No, there are not.

Q. Now, you went on to point out that this counter device was an essential part to play this machine. Now, you demonstrated here, you worked this device mechanically without any connection with the counter device. You, as an expert, would be able to operate the machine with the counter disconnected?

A. The question was asked me as it was, complete.

Q. I am not asking you to go back to the question. Could you make this operate without the counter device being tied into this thing?

A. Are you talking about Exhibit 1 and 1-A together, are you talking about this unit?

Q. Let me take it this way: Can you wire this (indicating), so the counter does not operate, using the counter in this machine here (indicating)?

A. Yes. [37]

Q. Could you make this (indicating) operate without the counter working in this machine (indicating)?

A. Yes.

Q. Could you make it work without this coun-

(Testimony of Glen Tarbox.)

ter (indicating) working on this machine (indicating)?

A. You mean the wheels spin and operate?

Q. Yes. A. That's right, you can.

Q. Isn't it a fact, when all this does—when you say this is an essential part, all it does is keep track of the play and is a connecting switch for current to go through? A. Essentially, yes.

Q. In other words, you could bypass this (indicating) if you could turn the current into here (indicating) with a direct switch, and not have to have this (indicating) at all? A. Right.

Q. Again going back to the counting device, have you ever seen a counting device on any other machine other than machines of this type in your business as a repair man? A. That type?

Q. A counter of that type or similar?

A. Well, you see it—I won't say it is common to this type business. They use it in a lot of different types of business.

Q. Use it in a lot of different types of business? [38] A. Yes.

Q. Getting down to examples, is that used on the shuffleboard, so-called shuffleboards to keep track of plays? I am speaking of the coin-operated shuffleboards?

A. I couldn't say definitely, I have never seen one.

Q. It is used on pinball machines, counters of that type? A. Similar, yes.

Q. Actually, what does the counter do, insofar

(Testimony of Glen Tarbox.)

as the machine is concerned, what does it purport to do, or what does it actually, physically do?

A. It gives the person playing the machine a record of how many free plays he has.

Q. It is a recorder or counter?

A. Right.

Q. That counter doesn't determine how many free plays he gets or what his score is, it merely counts how many times it has been played, and then records if the device gives him back some plays, and records how many it gives back?

A. Right.

Q. Now, again going to this particular counter, have you had occasion to repair any parking meters? A. No.

Q. Have you had any occasion in your work to repair any electrical counting devices?

A. Yes. [39]

Q. In what other machines—you said this was used in other items—in what other machines are counting devices used, electrical?

A. I have worked them on pinball machines; I have worked, not that type counting device, but similar ones, in electric phonographs; I worked on them during the war in electronic devices.

Q. That is what I am getting at, there are some phonographs that have the same—I shouldn't say the same, because each manufacturer manufactures them differently? A. That's right.

Q. But they are on phonographs to determine how many times the phonograph has been played?

(Testimony of Glen Tarbox.)

A. Right.

Q. You were making some description with reference to the springs and the control, is there any way—withdraw that. Can a more skillful player get a different score than a less skillful player on this machine, to your knowledge, anything of skill connected with the handling of it?

A. That is a matter of opinion.

Q. You have heard of the so-called rhythm play that is supposed to be able to? A. I have.

The Court: Can the reels in this machine be adjusted so as to control the number of games that will be reflected in the [40] counter?

A. You mean percentage-wise?

The Court: Yes.

A. That can't be controlled, no, that is set up in the factory.

The Court: That is what I mean, is it set up so that more games are lost than won, is that it?

A. Well, I don't know how it is set up.

The Court: But it can be?

A. Oh, yes.

The Court: In other words, it doesn't depend upon chance, the operation of this machine?

A. Let me straighten that out. It works on the law of average is what it actually is, which, over a period of time, should be to the advantage of the machine.

The Court: Because there are more non-winning combinations on it than there are winning combinations on it? A. Right.

(Testimony of Glen Tarbox.)

The Court: It is not otherwise adjusted?

A. Not to my knowledge.

The Court: Or can it be otherwise adjusted?

A. Not to my knowledge.

Q. Now, when you were speaking, when you were talking about plates or discs here, when you make reference to the reels or drums of a slot machine, is this the part they are speaking of, [41] or are they speaking of a different reel or drum when talking about reels and drums on slot machines? What would you refer to these in your slot machine business?

A. A reel or drum on a slot machine is different than that.

Q. Going over here, on the old type slot machine, the score was registered, was it not, by the reel that revolved and had insignia on it and then came to a stop in your old type slot machine?

A. That's right.

Q. It was that reel or drum that revolved that was commonly called the reel or drum of the slot machine? A. Right.

Q. This one you were talking about was referred to as a disc or plate, am I correct?

A. I would say so, yes.

The Court: Court will stand in recess until 20 minutes after 11.

(10-minute recess.)

Mr. Magagna: I have no more questions, your Honor.

(Testimony of Glen Tarbox.)

Redirect Examination

By Mr. Cyr:

Q. Mr. Tarbox, on cross-examination they asked you about the coin slot. It is true, isn't it, this yellow button has replaced the coin slot on the slot machine? [42]

A. It is used to start the machine, yes.

Q. Yes. It serves the same function. You were asked whether or not these counting devices appear on other machines and you stated that they appeared in pinball machines. I will ask you if a pinball machine contains the guts of a slot machine as this machine does? A. No.

Q. You were asked if they were on phonographs. I will ask you if a phonograph machine contains the guts of a slot machine as these machines do? A. No.

Q. Do any of the other machines where these drums or reels are used contain the guts of a slot machine as these machines do? A. No.

Q. Now, you were asked about the three discs which appear in the part I refer to as the guts of the machine. You stated the slot machine had a reel or drum with fruit or bar bells on it. I would ask you if that slot machine, whether the drums could be removed by cutting the spokes in there, and whether the machine would operate without those?

A. Yes.

Q. It is true, is it not, that those drums or reels on a slot machine are merely for the purpose of

(Testimony of Glen Tarbox.)

showing the player whether he won or lost? [43]

A. Yes.

Q. The drums or reels on this machine are for the same purpose, are they not?

A. I would say yes.

Q. In fact, you could on these machines, if you wanted to, you could remove any of a combination of parts and still have a working mechanism of some kind, you could make some wheels turn or some—you don't need any of the machine to make the others function mechanically? A. No.

Q. To make the machine complete as it stood, Exhibit 1 and 1-A and 2 and 2-A, the drums which appear on the face of the machine marked 1 and 1-A and 2 and 2-A are an essential part of the machine as it is now constituted, make it a complete unit as it now stands? A. Yes.

Q. And just for the record, on the slot machine, when these three widely spaced discs in the guts of the machine would record a winning combination that would indicate to the player he had won, but rather than a tally, that actually paid in cash, isn't that the way the machine operated? A. Yes.

Q. Now, would you step down, please, and take a look at the insides of this machine, the hull of the machine which is marked as Plaintiff's Exhibit 1. Referring to the notches [44] in the bottom of the wood and the notches and cutout on the face casting, does that appear to be the same as was on the slot machine where the coin payout was?

(Testimony of Glen Tarbox.)

A. I couldn't say, but it appears to be.

Mr. Cyr: You may sit down. The Government rests, your Honor.

Recross-Examination

By Mr. Magagna:

Q. Now, the Government attorney has asked you a question if the pinball machine contained the guts of a slot machine. Now, going into what are the guts of a slot machine, referring to this, are there some other guts of a slot machine or machines you worked on beside these? A. Yes.

Q. Did the slot machine have a tube or container to receive money? A. Yes.

Q. It had an escalator to handle money?

A. Yes.

Q. It had a place for money to be inserted?

A. Right.

Q. It had a payout slot for money to come out of? A. Yes.

Q. In your opinion as an expert, which part is the guts of [45] a slot machine, this or the payout mechanism?

A. Well, it takes the whole thing to operate.

Q. So when you answered that this did have the guts of slot machine, you were referring that it had some metal like a slot machine, and some discs like a slot machine, you didn't intend to testify this had the guts of a slot machine? A. No.

(Testimony of Glen Tarbox.)

Q. Those words were put in your mouth when he asked you the question in that manner?

A. My interpretation was that there are parts on this one, the main part of this, the part here (indicating) is part of the mechanism of the slot machine.

Q. Now, if you were going to take this particular thing, this particular unit now and going to try to convert this back into an old time slot machine like the ones you worked on, what would you have to add to the thing to make it the same as the old time slot machine?

A. Well, there is considerable, you would have to put symbols, a release with symbols on, you would have to have a payout tube, slides to control your payout.

Q. Now, when you testified that this button replaced the coin hole for the slot machine, does this replace it? A. I said it did the same job.

Q. It does the same job?

A. Starts the machine. [46]

Q. It releases the machine so that it can work?

A. Yes.

Q. Now, I believe he asked you to look down here at this particular thing (indicating). Is there anything on this casting, this front casting—could this be used as it now stands—it looks like the front of the casting, if you took the casting off and kept all the other mechanism intact and set this casting on and bolted it on, would the thing work?

A. What do you mean by work?

(Testimony of Glen Tarbox.)

Q. Could you operate a slot machine and could you play it by using this identical casting? What I am trying to make out, this thing could not be converted over. There is no place you could knock out a plug, no tube, you would have to reshape it?

A. Right.

Q. It isn't interchangeable from this unit to the old time slot machine case?

A. The front isn't, no.

Q. Again, going back to this counting device that is on here, I believe he says as now constituted, it is an essential part. What does this counting device do, specifically, on this machine, just what does it do?

A. It records for the patron how many free plays he has left.

Q. It in no way controls this guts of the old time slot [47] machine?

A. No, it allows him to start it or stop it is all.

Q. It allows him to start or stop it?

A. It allows this thing to operate is all.

Q. Now, you have examined this particular machine, I presume, in detail? A. Yes.

Q. With reference to the shell or hull, by examination was this hull or shell made in the same manner—was it made in such a way it could have been used either for this machine or a slot machine?

A. The unit as a whole, you are talking about?

Q. I am talking about just this hull with the front casting, the markings where the grooves have been cut to set the machine in?

(Testimony of Glen Tarbox.)

A. Without putting a slot machine right beside, I couldn't tell, but they are quite similar.

Q. Are there any grooves indicating you could pull this unit out and set the other unit in, are the grooves cut so it would just fall in place?

A. You are talking about this mechanism here (indicating)?

Q. No. If we went down and located a mechanism of an old time slot machine, could we just take the guts out—using the words of the District Attorney—and set it in? Are there grooves and things cut so it would fall automatically in place? [48] What I am trying to get at, this case was made for this unit, and it isn't a conversion job of an old case made for a slot machine unit?

A. That I couldn't say without putting two of them side by side.

Q. Is there any grooves or cuts here that you could identify here as being indentically the same as slot machines are—I will withdraw that last question. I you don't know, I guess we can't find out. Now, when this machine is set up and operating—look at this one here (indicating)—and if we connect the unit and kick it on, is there anything about the machine, that is, I am talking strictly now about the machine, that in any way, after you have played, and assuming you are lucky or skillful, that you get the Bingo combination here, is there anything about the machine that will deliver to the player money or merchandise, anything of value, the machine itself? A. No.

(Testimony of Glen Tarbox.)

Q. There is no apparatus that the player could get it directly from the machine? A. No.

Mr. Magagna: That is all. We have no further questions.

Mr. Cyr: We have no further questions.

(Witness excused.)

Mr. Cyr: The Government rests. [49]

The Court: Very well, any evidence for the claimant?

Mr. McCarvel: Your Honor, at this time, we would like to make a motion.

The Court: Just one minute before you make the motion. All the testimony has been directed primarily to Exhibits 1 and 1-A. Are Exhibits 2 and 2-A similar.

Mr. Magagna: It would stand. The testimony would be the same, and we thought in order to avoid duplication, we agreed.

The Court: Proceed with your motion.

Motion to Dismiss

Mr. McCarvel: Your Honor, I would like to make a motion at this time that the amended libel of information be dismissed on the ground and for the reason that it hasn't been shown by any of the evidence that this machine is the type of machine that has been outlined by the Johnson Act, and it hasn't been shown that this machine has the elements that the act requires. More particularly, referring the Court's attention to Title 15 of the

United States Codes, Section 1171, which defines a gambling device as follows: "Any so-called slot machine, or any other machine or mechanical device, an essential part of which is a drum or reel with insignia thereon—" and we submit, your Honor, there has been no evidence presented here that there are drums or reels with insignia thereon that this section defines. And, also, there has been testimony here that this machine has been used as [50] a gambling device, but there has been no evidence in reference, referring again to the Johnson Act, or Subdivision (a) of Paragraph 1 thereof, "that which, when operated, may make delivery as the result of the application of an element of chance, any money or property," or Subdivision (b), "by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property." Now, your Honor, we submit under the evidence presented here by the Government that it hasn't been shown that there are any drums or reels on this machine with insignia thereon that are an essential part of this machine. It hasn't been shown that the machine itself pays out any money or any property, and we ask at this time that the action be dismissed on that ground.

The Court: I will reserve ruling on your motion. You may present any evidence that you wish.

JAMES J. HANNIFIN

claimant, called as a witness in his own behalf,
being first duly sworn, testified as follows:

Direct Examination

By Mr. McCarvel:

Q. Will you state your name, please?

A. James J. Hannifin. I reside at 15 South Excelsior, Butte, Montana. [51]

Q. Referring to the Government's Exhibits Numbers 1 and 1-A, and 2 and 2-A, are you the owner of these machines? A. I am.

Mr. McCarvel: That is all.

Cross-Examination

By Mr. Cyr:

Q. From whom did you purchase the machines?

A. Buckley Manufacturing, Chicago.

Q. Who transported them in interstate commerce? A. American Railway Express.

Mr. McCarvel: To which we object as going beyond the scope of direct examination.

The Court: I think you said it has been admitted they were transported in interstate commerce.

Mr. Cyr: I am asking whether he bought them or——

Mr. McCarvel: It is immaterial.

The Court: What difference does it make?

Mr. Cyr: Withdraw the question. That is all.

Mr. McCarvel: That is all.

(Witness Excused.)

Mr. McCarvel: We would appreciate it very much if we could have a recess until after lunch to go over this matter and get our witnesses together.

The Court: Very well, Court will stand in recess then until [52] two o'clock this afternoon.

(Noon recess.)

Mr. Cyr: Your Honor, there is one matter before we proceed. I would like to re-open the Government's case and request the Court to take judicial notice of some matters I think might be of some assistance to the Court, being the case of the United States of America against One Joker Type Slot Machine, Third Division, Territory of Alaska, Anchorage, in which the same machine was held to be a gambling device under the same section. I wish to move the Court also to take judicial notice of the Report of the House of Representatives 2769 in the 81st Congress, Second Session, of August 1, 1950, and the Report of the Senate 1482, 81st Congress, Second Session, April 12, 1950, legislative day March 29th. That is all we have.

Mr. Magagna: I presume he is not attempting to offer this in evidence. That would be brought in as a matter of argument.

Mr. Cyr: I have asked the Court to re-open the Government's case for the purpose of requesting the Court to take judicial notice of those matters for the purpose of providing our position on the law and what other Courts have done with reference to these devices.

The Court: The Court will accept them. You have copies of the Report of the Senate? [53]

Mr. Cyr: Yes, your Honor, I do have copies here. If the Court wishes these, they are printed, both of them. I think the Court has them. I don't have the page number of the published reports.

The Court: The Court will accept those as an aid to interpret the statute, and so far as the case in Alaska is concerned, it is like any other case in a book, I'll read it in connection with my efforts to make a determination of what the law is.

Mr. Cyr: I don't know it is reported in Federal Supplement, but I did get certified copies of it.

Mr. Magagna: Could I ask you again which reports you mentioned, what are the numbers of them?

Mr. Cyr: Report of the House of Representatives 2769 and Report of the Senate 1482.

Mr. Magagna: I wanted to see if we were talking about the same ones.

The Court: Very well, you may proceed.

BERNARD T. McMANUS

called as a witness on behalf of the claimant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Magagna:

Q. Will you state your name and place of residence? [54]

A. Bernard T. McManus, Lander, Wyoming.

(Testimony of Bernard T. McManus.)

Q. By what company are you employed at the present time?

A. Buckley Manufacturing Company, Chicago.

Q. In what capacity? A. Sales Manager.

Q. Do you have any other business interests in addition to your employment by the Buckley Manufacturing Company?

A. Yes, I have two drug stores in Wyoming.

Q. Where are they located?

A. Casper and Rawlins.

Q. The Buckley Manufacturing Company you are talking about is the Buckley Manufacturing Company that manufactured Plaintiff's Exhibits 1 and 2, that is, not in their entirety?

A. Yes, sir.

Q. And 1-A and 2-A?

A. Yes, sir. They don't manufacture all the parts, but they assemble them.

Q. Does the Buckley Manufacturing Company do any other business other than assembling these particular machines?

A. Yes, they make kitchen stools, and they make some slot machines, all special order for Nevada, and they make an Irish Mail toy, and they also make Block City toys, things of that kind.

Q. Prior to the time you became an employee of the Buckley Manufacturing Company, did you have any connection with these [55] machines or similar machines?

A. Well, I don't know just how you mean that. I invented the machine, if that is what you mean.

(Testimony of Bernard T. McManus.)

Q. Did you have anything to do with designing or manufacturing these machines? A. Yes.

Q. And what was your connection in that regard?

A. Well, I was the inventor of the machine and did make or assemble them much the same as Buckley does now.

Q. Did you ever make—when did you first conceive of this machine?

A. In the fall of 1949.

Q. Did you ever make application for letters patent on the machine?

A. Yes, sir, in the spring of—I can't remember the month, but it was in the spring of 1950.

Q. And was there a patent ever issued on it?

A. Yes, sir.

Q. Do you know when that was done?

A. Well, there has been an awful lot of patents issued on it. I just don't remember the first date. It takes quite awhile, 1951, or 2, I can't remember the exact date.

Q. Now, was your patent application filed prior to or after the enactment of the Johnson Act?

A. Prior to. [56]

Q. I mean did you file for a patent before the passage of the Johnson Act? A. Yes, sir.

Q. Now, at the time you designed the machine and filed for letters patent, did you have knowledge as to the proposals of the Johnson Act?

A. No, sir.

Q. Your designing of this machine was not for

(Testimony of Bernard T. McManus.)

the purpose of evading the terms of the Johnson Act? A. No, sir.

Q. Now, did the question of whether or not the machine that you had invented—did the question of whether or not the machine you invented come under the purview of the Johnson Act come up before this case here? A. Yes, sir.

Q. When did that come up?

A. I believe in 1952.

Q. Where did that case come up first?

A. In the State of Wyoming.

Q. In what Court?

A. The Federal Court at Cheyenne.

Q. Now, what was the case about in Cheyenne?

Mr. Cyr: To which we object, your Honor, on the grounds this is not the best evidence. The best evidence is the case itself, which is reported in the Federal Supplement. [57]

Mr. Magagna: That one is not reported in the Federal Supplement. If you want to stipulate, I have copies here, and I will introduce it as the best evidence.

Mr. Cyr: Fine.

Mr. Magagna: Insofar as the judgment was—I was asking what the case was about in relation to the machine, whether this type of machine or another type machine.

Mr. Cyr: We understand it is this machine. I didn't understand what you were aiming at.

Mr. Magagna: There is a distinguishing feature between the two machines. You have a copy of this?

(Testimony of Bernard T. McManus.)

Mr. Cyr: Yes, that is United States vs. McManus?

Mr. Magagna: Yes. It would be the same as the other.

Mr. Cyr: Yes.

Q. The point I am trying to get at, Mr. McManus, is that in the case in Wyoming, there was introduced as exhibits a machine, I think, marked as Exhibit "A," and a second machine which was introduced by the defense as Exhibit "B"?

A. Yes.

Q. Now, what was the difference between the two types of machines?

A. Well, the Exhibit "A" was a machine similar to this exhibit, except instead of the flashing lights in front, it had reels and drums with insignia thereon that the slot machines were using at that time, and that was the machine I was [58] indicted on for interstate transportation.

Q. The machine that was introduced as Exhibit "B," how did it compare to this particular machine? A. It was like this one here.

Q. It was called the Joker—could I see the insignia? I haven't even looked at these machines.

A. Yes, the same insignia, but not like this Bingo. It was the same type and everything, but it didn't have Bingo, it had the fruit symbols on it.

Q. This plate was like this instead of like that (indicating)? A. Yes.

Q. Now, with reference to that machine, had

(Testimony of Bernard T. McManus.)

that machine been transported in interstate commerce at that time? A. Which one?

Q. The second one? A. Yes, sir.

Q. Were you indicted on the transporting of that machine? A. No, sir.

Q. Now, Mr. McManus, going to you as being the inventor and designer of this particular machine, you have had occasion to see slot machines?

A. Yes, sir.

Q. Now, with reference to this counting device here that shows these numbers here, and the same thing that is in your [59] remote control, are those type of counting devices on your old type slot machine? A. No, sir.

Q. Now, have you had—are those manufactured especially for this machine, or are they purchased on the market?

A. They are purchasable and nationally advertised for any type machine that needs a recording device.

Q. Now, do these particular counting devices have anything to do with the operation of the machine other than recording the score?

A. Well, they record, as was testified, they show the purchases of games to be played, and the score received.

Q. Do they in any way control this mechanism here as to how many times they turn around or where they wind up or where they stop (indicating)? A. Merely a recording device.

Q. It is merely for recording the number of

(Testimony of Bernard T. McManus.)

plays at the beginning and the number of plays that come out of the machine? A. Yes, sir.

Q. Could you operate the machine if you were to take those two recording devices out from the respective units? A. Yes, sir.

Q. Now, going with specific reference, and taking this a part at a time, with reference to the plate or casting here [60] on the front, was that designed specifically for this machine? A. Yes, sir.

Q. Could this be interchanged and used in conjunction with the plate for a slot machine?

A. Impossible.

Q. Specifically, is there any place where any coin slots could be put into this plate without making it over? A. Impossible.

Q. Now, with specific reference here to this yellow spot on the top where this yellow block is, is there any slot there where a coin could be dropped into the machine?

A. There is no slot, no escalator or any tube or anything like that.

Q. With reference to this button here, is that used on a slot machine? A. No, sir.

Q. Now, you also designed the case or the hull that the whole machine is in. Other than being similar in appearance, is that interchangeable with the hull used by a slot machine?

A. One piece of the top is, and the lock part is, but the other has fittings and things that it wouldn't work. The back door, I believe, I am pretty sure,

(Testimony of Bernard T. McManus.)

would fit one, and the top part that goes in the back would.

Q. What I was wondering, if you were to take this mechanism here out and this bottom electrical part out, could you set [61] the workings of a slot machine in here and have it so it would fit and be able to work in this case?

A. I would say no. You might be able to get it in there some way, but even that carriage is all different, everything is different in there.

Q. Going specifically to the similarity of the slot machine part of it, what are the essential parts of a slot machine that don't show here at all?

A. If you take in the brackets——

Mr. Cyr: We will object to this on the ground the witness has not been qualified as an expert regarding slot machines. We have no doubt he is, but we would like to have him qualified for the record.

Mr. Magagna: I think the witness has showed he invented this particular machine. He can testify——

The Court: I think it would be better if you would qualify him further. I know he knows something about slot machines.

Q. Mr. McManus, have you had occasion to see slot machines? A. I am afraid I have.

Q. At the time you were working on this particular machine, did you have a chance to examine and look at a slot machine? A. Yes, sir.

Q. Going to the next step on that, have you made a comparison as to the difference between this machine and an actual slot machine? [62]

(Testimony of Bernard T. McManus.)

A. I have not made an actual comparison. I can do it here in a hurry.

Q. Have you looked at one and looked at the other to see where they differ? A. Sure.

Q. Going from there, in what respects do they differ particularly?

A. Well, it would be easier to tell you how—pardon me—I mean there is so many things.

Q. Let me withdraw that question and ask it this way: Does the slot machine have a slot for the insertion of a coin?

A. I think I know what you mean now. It has, of course, first, and then it has an escalator that takes the coin through a process to be sure it is not a slug, that it is a coin. The coin, it drops down and trips a lever that releases the handle to work the mechanism. Do you want me to go further on what happens then?

Q. Does this machine have any such part as that?

A. No, sir, that is a lot of parts. An escalator will take several hundred parts.

Q. Does the slot machine have a box for the receiving of coins? A. No, sir.

Q. Slot machine? A. Yes, sir. [63]

Q. Does this machine have? A. No, sir.

Q. Does the old slot machine have a place for the dispensing of coins? A. Yes, sir.

Q. Does this particular machine have such a place? A. No, sir.

Q. Now, with reference to this machine here, Plaintiff's Exhibit 2, after it is played—or put it this

(Testimony of Bernard T. McManus.)

way: when the handle is pulled, what happens that the patron can see?

A. On this particular one, the different numbers light up, the lights behind go on and off and come to rest finally on one in each of the columns.

Q. When the play is completed, there is a light on in each of the columns? A. Yes, sir.

Q. Now, in making that comparison with the old type slot machine, what happened that the patron could see when he pulled the handle?

A. On the drums or the reels, the insignia would line up in a straight row. Whatever lined up in the straight row with the score card in front was what he was entitled to.

Q. In any part of either of these two machines is there any of the reels or drums you have just mentioned that were on the old type slot machines, in these machines? [64] A. No, sir.

Q. Now, were you ever advised, either directly or indirectly, as to whether or not this type machine, by any governmental agent, as to whether this type machine would or would not come under the Johnson Act?

Mr. Cyr: To which we object on the grounds it calls for hearsay.

The Court: Do you want the Court to be bound by what somebody told him or didn't tell him?

Mr. Magagna: I want the testimony to show——

The Court: Somebody else had another idea?

Mr. Magagna: That is correct, whether he was

(Testimony of Bernard T. McManus.)

told whether it was in violation or not. He is the manufacturer of the thing.

The Court: The unfortunate thing, it is going to be my responsibility to determine that, however poorly qualified I may be. I don't see how it could help me by telling me John Jones in Washington, D. C. doesn't think this is covered by the Act, because I suppose there are some people who don't think it is covered by the Act, as there are some people who think it is.

Mr. Magagna: I think we can raise that point in argument anyway, so we will probably handle it there.

The Court: Yes, that's right.

Mr. Magagna: That is all, you may cross-examine. [65]

The Court: Before you finish here, you might demonstrate the machine to me, that is, play five or 10. You have had him describe it.

Q. Will you step down and demonstrate it.

A. (Demonstrating) The plays, your Honor, are stepped up on this machine here. That is 10. That releases the handle for the number of times that the patron has played the machine.

Q. Just one minute, so we will have it in the record. The remote control device, which is marked Plaintiff's Exhibit 2-A indicates a number 10. Now, referring to Plaintiff's Exhibit 2, what does it show as to the number?

A. It shows also that the player has 10 games to be played.

(Testimony of Bernard T. McManus.)

Q. Now, will you proceed.

A. (Demonstrating) You—to release the handle, you press that button, and it releases it for one, and this drops down to 9.

Q. The scoring device mark goes down to 9 after one play.

(Witness plays the machine.)

The Court: You have got your own system, have you?

A. I was going to try to show you something, your Honor.

(Witness plays machine several times.)

A. I am all through.

The Court: Now, you can't play it again?

A. That's right.

Q. Now, while that was being played, there is just one other [66] question, insofar as in this working mechanism, are there any reels or drums that are turning?

A. No, sir.

Mr. Magagna: That is all.

Cross-Examination

By Mr. Cyr:

Q. Mr. McManus, how long have you lived in Lander, Wyoming?

A. 25 years.

Q. During the course of that time——

A. 23, pardon me, I believe 23 years.

Q. During the course of that time, have you been engaged in the business of coin operated machines prior to the invention of this device?

(Testimony of Bernard T. McManus.)

A. Yes, sir.

Q. For how long have you been engaged in coin operated machines there?

A. Well, it was strictly a side line in my drug stores. I had machines, and a few friends—I had two machines.

Q. Did you have some slot machines among those? A. Yes, sir.

Q. Were you familiar with the operation of slot machines? A. Yes, sir.

Q. And the working parts of them prior to your invention of this device? [67]

A. I didn't get that.

Q. You knew the workings of your slot machines prior to your invention of this device?

A. Yes, sir.

Q. How long had you had slot machines prior to that?

A. Well, like everybody else, we would have them sometimes and sometimes we wouldn't.

Q. Intermittently for how many years?

A. Oh, probably seven or eight years.

Q. So you were pretty well familiarized with the workings and operation of slot machines?

A. Yes, sir.

Q. By that, I am referring to the old type, not the old innovation? A. The what?

Q. You stated, I believe, on direct examination that there were only two parts of this machine which would be interchangeable with the slot machine?

A. No, I didn't say that, I said of the shell.

(Testimony of Bernard T. McManus.)

Q. Of the shell? A. Yes, sir.

Q. What parts are those? Would you indicate to the Court on Plaintiff's Exhibit 1, that being the same as Plaintiff's Exhibit 2?

A. They being this back piece (indicating), I think it would [68] fit.

Q. The plate which is behind the button on the top of the machine? A. Yes, sir.

Q. And what else? A. And the locked door.

Q. And the door on the back? A. Yes, sir.

Q. Now, calling your attention——

A. If I may qualify that, I didn't consider the handle.

Q. But that is interchangeable, is it not?

A. They have to be fitted, but it could be fitted.

Q. We want the Court to know all the facts.

A. I am talking about the shell.

Q. How about the base of this machine, isn't it true the base of the machine——

A. That is the shell. We get these from a manufacturer, this and this is part of the shell, this is the plate in front, and this is the top, and that is the door (indicating).

Q. Is it true that the base could be used for the shell of a slot machine?

A. It might be fitted, you could woodwork it.

Q. I refer you to the cut-out in front. Isn't that the same size and shape as the cut-out for the pay-out on slot machines? [69]

A. I couldn't tell you.

(Testimony of Bernard T. McManus.)

Q. It appears to be?

A. Yes. I couldn't tell you if it would fit or not. Those are bought manufactured, in other words. I could cut wood any way. I couldn't tell you by the shape of the piece whether it would fit or not.

Q. They may be old parts of slot machines, some parts of them?

A. No, they are all brand new, ordered.

The Court: Let me ask a question. Do you order that that way?

A. I am not in the ordering department.

The Court: You designed the machine. Did you design it that way?

A. With a piece cut in the wood there?

The Court: Yes.

A. No, I don't know—it is this part here cut out in the base that I couldn't say.

The Court: You don't know whether you designed it that way or not?

A. Well, my first machine was hand made, which I made myself and was a different manufacture.

The Court: Just answer the question directly, if you can. If you can't just say so. Did you design it that way?

A. With the wood cut out like that? [70]

The Court: Yes.

A. No, sir.

Q. You have testified concerning the chromium plate in front of this machine? A. Yes, sir.

Q. There is a casting that is attached to that by screws, is there not, which is also cut out on the bottom to conform to the cut-out of the base plate?

(Testimony of Bernard T. McManus.)

A. This casting, I paid a man to design it myself.

Q. How about the casting inside, did you pay him to cast it in that fashion?

A. That is all one piece.

Q. Aren't there screws here (indicating)?

A. This part here (indicating)?

Q. Yes, the part inside, to conform to the cut-out in the base plate.

A. That is still not the shell of the machine.

Q. Did you design it in that fashion?

A. No.

The Court: Speak up.

Mr. Cyr: The answer was "No."

Q. Now, the outside appearance of the machine, referring to the contour and shape, that is the same contour and shape as a slot machine, is it not?

A. Yes, sir. [71]

Q. And referring to the legend of pay-outs, or schedule of payments which appears on the face of the machine, that is showing "Three Jokers, 100," that is similar to what appeared on the face of a slot machine, is it not? A. Somewhat.

Q. So, there are other similarities than those you mentioned between this and a slot machine. I mean just the shell?

A. That is called the score plate, it is not the shell. It may be my fault. When I said "shell," I was thinking in terms of what the parts are called.

Q. Now, referring to what I have crudely termed the guts of the machine for want of a better

(Testimony of Bernard T. McManus.)

word, that operates in the same fashion as a slot machine, does it not? A. Very similar.

Q. And I believe you testified, for instance, that on this—strike that—Would you step down here and point to the mechanism on this which controls the number of games won, which portion of this, can you tell me?

A. The number of games won?

Q. Which of the controls here?

A. I can show you how it works.

Q. Yes, do that.

A. (Demonstrating) It is activated——

Q. Now, that operation is mechanical, is it not?

A. Yes, sir. [72]

Q. The handle which performs the function which your fingers did in pushing this down?

A. Yes, sir.

Q. Here I see there is one, two, three discs which have contact points (indicating)?

A. Yes, sir.

Q. Those have replaced which was formerly a drum and reel with insignia in the slot machine?

A. Yes, sir.

Q. In a slot machine, it is true, is it not, they could have taken the drums and reels off, that it is the portion at the extreme end with the three close set, notched discs that controls the pay on the machine, is that true?

A. Well, they contribute to it.

Q. Well, they control it, as a matter of fact, don't they, on a slot machine?

(Testimony of Bernard T. McManus.)

A. Well, they are part, it takes more than just them.

Q. These three things (indicating), they don't do anything other than indicate to the player whether he won or lost, what was formerly described as drums or reels? A. That's right.

Q. They have no purpose except to show him whether he has won or lost upon pulling the handle?

A. That's right.

Q. And they are in no way essential to the operation of the [73] slot machine, are they?

A. That's right.

Q. And the electrical portion of the machine, all of this wiring, is designed for the purpose of replacing what you have referred to as the coin slot, the escalator, the coin tube, the pay-out box, is that right?

A. Well, I don't know whether you mean replace them or not.

Q. Well, in other respects, it operates the same as the slot machine, doesn't it?

A. No, no, it has similarities, but it doesn't operate the same.

Q. I say in other respects, those electronic control—strike that. Go through it this way: rather than putting a nickel in this machine, you give the nickel to the bartender who records the game on the black box marked 1-A or 2-A?

A. That's right.

Q. As the result of paying the nickel to him

(Testimony of Bernard T. McManus.)

rather than putting it in the slot, you are entitled to push the button in the same place as the coin slot? A. Yes, sir.

Q. And that entitles you to pull the handle, which was the same result you obtained by putting a nickel in the machine?

A. It activated the machine.

Q. As a result of pulling that handle, lights flash on the face of these to entertain the customer? [74] A. That's right.

Q. As a result of where these things on the right side, I don't know what you call them come to rest on three sprockets——

A. Sprockets is right.

Q. That determines whether or not the player wins or loses, is that right?

A. That is the final analysis, yes.

Q. As a result of the action of that machine, there is recorded on these three drums or reels——

A. We don't call them that.

Q. That is what I call them—with the numbers on them, either one game less, if you lose?

A. Yes, sir.

Q. Or some additional games if you win?

A. Yes, sir.

Q. So, each time you pull the handle, it has an effect on those wheels, and causes them to move, either by decreasing the number or increasing?

A. Yes, sir.

Q. It has the same effect on these black boxes, 1-A or 2-A, does it not? A. Yes, sir.

(Testimony of Bernard T. McManus.)

Q. Now, I believe you stated that these recording devices can be purchased on the market for other machines? A. Yes, sir. [75]

Q. Isn't that true of many of the working parts of this, the wire which is included in it?

A. Yes.

Q. The button? A. Yes, sir.

Q. Many of the parts of the mechanical slot machine can be used in cash registers or business machines, can they not? A. Yes, that's right.

Q. But the fact is, all these component parts make up this machine which you have designed and which is manufactured by the Buckley Manufacturing Company? A. Yes, sir.

Q. That is the machine as it was designed, with the exception you have stated in previous cross-examination?

A. That wasn't the original machine. I don't want to get confused. There was two machines, originally. If you will re-phrase that question, maybe I can answer it, that last one, sir.

The Court: I suppose what you want to know is, did you design this machine that is Exhibit 1?

A. Yes, sir.

Q. Yes, it was designed in this fashion, except for the differences which you pointed out, the holes and the other thing which appears to be like a slot machine? A. Yes, sir. [76]

Q. When you designed this machine, you put all of these things on here with a specific purpose in mind, did you not?

(Testimony of Bernard T. McManus.)

A. In other words, to save money.

Q. The idea was that the component parts would make the machine which is the machines, Exhibits 1 and 2 which are here?

A. That people would play.

Q. In the design of this machine, you had in mind economy of parts and money, did you not?

A. I sure did.

Q. You didn't, therefore, put in parts that were not necessary to the machine?

A. Do you mean mechanically, or customer appeal?

Q. By reason of expense and economy, you didn't use any parts that were not necessary, did you?

A. I imagine—no.

The Court: Counsel, as the witness pondered his question, the answer he was going to give to the question, I noticed that he looked at you, and I noticed you looked at him and shook your head no.

Mr. Magagna: If I did so, I did it without realization, your Honor, that question was not discussed by us.

The Court: I didn't say it was discussed by you, I say that is what I saw. I saw the witness not able to answer the question, apparently; I saw you glance at the witness and [77] shake your head in a negative fashion.

Mr. Magagna: It was pure reflex.

The Court: After you shook your head in a negative fashion, the witness answered "No." Because of counsel's statement in the first instance as

(Testimony of Bernard T. McManus.)

to your position in the Wyoming Bar, I would hesitate to say, of course, that it was done with any intent to give the witness the answer, or that it was done contemptuously of this Court, but let me warn you at this point not to let that sort of thing happen again, even inadvertently.

Mr. Magagna: I want to make my position clear to the Court. If it was done, it was reflex action, I didn't even realize he was looking at me.

The Court: I realize that, but don't let it happen again. Proceed.

Q. Your answer to that question was no, is that correct? A. Yes, sir.

Q. Is that the answer you were trying to give?

A. I was looking at you. If you ask them shorter—you get into real long ones, I get confused, I am sorry.

Q. I asked before, you stated you designed this with economy of parts and economy of money, that is correct? A. Yes, sir.

Q. I said, therefore, you did not put any parts in this machine which were not necessary to its operation. To that [78] question you answered "No," is that correct?

A. I was trying to think back. I have had lots of trouble like any man that starts out trying to build something.

Q. Do you receive royalties from the sale of these machines? A. Myself?

Q. Yes, sir. A. Indirectly.

(Testimony of Bernard T. McManus.)

Q. You do, by reason of the sale of these machines, receive some money, then?

Mr. McCarvel: We object to this as being incompetent, irrelevant and immaterial to the charge laid in this case.

The Court: Overruled. He can show the interest of the witness.

Q. You do, you answered that as yes? Now, I don't believe we have clarified that, I don't want to argue with you, do you say no—strike that. Do I understand you there are parts in here which are not necessary, in your opinion, and which should not be in the machine?

A. I must qualify it with not bettering the machine. I would say there isn't any.

Q. There isn't anything in here which is not necessary to the machine, then?

A. I don't think so, sir.

Mr. Cyr: Yes, that is all. [79]

Redirect Examination

By Mr. Magagna:

Q. I will ask you to step down and examine this part (indicating). You were asked about these sprockets. Are there on there any insignia or markings of any kind on those? A. No, sir.

Q. With reference to the slot machines, what wheels or drums in slot machines had insignia thereon?

A. The drums that were visible to the player.

Q. Now, with reference to this counting device,

(Testimony of Bernard T. McManus.)

did I understand your testimony that the machine could be operated with that device out of there?

A. Yes, sir.

Q. This working part would completely work?

A. Yes, sir.

Q. So you could pull the handle and make it work if you were to take the assembly out?

A. Yes, sir.

Q. What that does is keep track of the number of games and that only? A. Yes, sir.

Q. We are speaking of this counter.

The Court: Yes.

Q. I believe it has already been testified to, but is there any way when this machine is played as presently assembled [80] that the machine itself will deliver to the patron who plays it any money or property? A. No, sir.

Q. Now, is there any way that by any simple operation, by taking out a lock or a plate that this machine would be able to deliver to the player money or property? A. No, sir.

Mr. Cyr: We will object to these questions on the grounds it is immaterial. The law doesn't require the machine itself to pay. I think the wording of it is "such that will cause——"

The Court: At least that is one phase of the law, anyway, with reference to that.

Mr. Magagna: Our purpose in this is to identify which section of the act this would have to come under.

The Court: The objection is overruled.

(Testimony of Bernard T. McManus.)

Q. You answered that, did you not? Is there any way by removing a plate or lock it would pay out money or property? A. No, sir.

Q. There is no way that could be done?

A. No.

The Court: Let's take a short recess.

Mr. Magagna: That is all.

The Court: I'll take a recess and you can decide whether you are through with the witness or not. Court will stand in [81] recess until three o'clock.

(10-minute recess.)

Mr. Magagna: We have no further questions.

Recross-Examination

By Mr. Cyr:

Q. I have just a couple of questions, Mr. McManus. During the time that you operated these slot machines, you became aware, did you not, that they have a distinct sound when played? You can listen to one, and you can tell it is a slot machine being played, can you not? A. Yes, sir.

Q. The whirring, clicking, and so on?

A. Yes, sir.

Q. Now, that sound is the same as the sound you get from these machines, is it not?

A. Very similar.

Mr. Cyr: Yes. That is all.

Mr. Magagna: No further questions.

(Witness excused.)

Mr. Magagna: The defendant has no further evidence at this time.

Mr. Cyr: The Government has no rebuttal. Your Honor, we would like to submit findings of fact in this.

The Court: Very well. There is one thing, I don't know how [82] material it is. I might—what was the name of the witness, the fellow, the man who said he was the bartender at the Eagles'?

Mr. Cyr: Ole Nelson.

The Court: Is he present?

Mr. Cyr: Yes.

The Court: Would you come forward, please? I want to ask him a question. You can make an objection to the question if it is not proper, and I'll determine whether I am right or not. Did I understand that both these machines, Exhibit 1 and Exhibit 2, and 1-A and 2-A were in the Elks' Lounge or bar?

Mr. Nelson: Eagles'.

The Court: Eagles' Bar, pardon me.

Mr. Nelson: They were, sir.

The Court: You testified they were played by patrons or members giving you some money?

Mr. Nelson: Yes.

The Court: How much money, I mean at a time, how much for a play?

Mr. Nelson: It was five cents a play.

The Court: Each machine was the same.

Mr. Cyr: On that same line, you would pay them a nickel for each point when they played the machine, if they had any left?

Mr. Nelson: Yes, if they had any. [83]

The Court: Any questions, anything further?

Mr. McCarvel: Your Honor, at this time, on behalf of One Electronic Pointmaker——

The Court: On behalf of what?

Mr. McCarvel: Of the defendant in this case.

The Court: Yes.

Renewal of Motion to Dismiss

Mr. McCarvel: I would like to renew our motion that this action be dismissed on the grounds and for the reason that there has been no evidence introduced by the government that the Exhibits, 1, 1-A, 2 and 2-A consist of a drum or wheel with insignia thereon. Of course, under Section 1117 of Title 15 of the United States Codes, which is commonly known as the Johnson Act, that is an essential element of proof in the case, and there has been no proof adduced as to that in this case.

The Court: Well, would the drum with the numbers on it indicating points, that wheel, whatever it may be called, would that satisfy that portion of the Act?

Mr. McCarvel: We will argue this and submit our authority. Our position is that that is not an essential part of the machine.

The Court: I'll take your motion under advisement and reserve ruling on it as I have your original motion, and you can argue the whole matter in briefs. The Government is given 20 days within which to file a brief. Can you file it [84] within that time?

Mr. Cyr: Your Honor, we have two trial terms coming up next week, I don't know how much——

The Court: If the Government's position is not correct, you have got somebody's——

Mr. Cyr: That's fine, your Honor, we will file it within 20 days.

The Court: You have got somebody's equipment here, unless the defendants themselves want additional time.

Mr. Magagna: We don't have any objection to giving them 30 days. They will have to send it back to the boss.

The Court: Our experience here in Montana is, I don't know how they operate in Wyoming, but the United States Attorney is the United States Attorney and is counsel for the government and represents the government and they seem to confer some confidence in him, as the Court does, just as the Court reposes confidence in all the members of the bar. Very well, the government is given 30 days, and how much time thereafter do you want to file an answer?

Mr. Magagna: The same amount.

The Court: Very well, and the government may have 10 days thereafter to file a reply if it is deemed necessary.

Mr. Cyr: Should we submit findings of fact and conclusions?

The Court: Yes, I think each party should submit with their [85] briefs proposed findings of fact and conclusions of law.

Mr. Cyr: One other thing, would you like to

look at it like this, or should we have the man put it back together?

The Court: You have one machine together and one apart. I suppose if it is necessary for me to look at it again, you might leave them as they are.

Mr. Magagna: There is one other thing I want to ask. We have stipulated to, or the Court will take notice of. I presume we can submit as argument the argument on the Senate floor and the House floor as to what the various Senators and Congressmen thought from the official Congressional Record?

The Court: Yes.

Mr. Magagna: The reason I asked the question, in our jurisdiction we have an agreement we can quote from the Congressional Record in argument, not as evidence.

The Court: Yes, because the Court can use official documents of the Government in searching for the proper interpretation and meaning of the statute. You can use it likewise in argument. Anything further to come before the Court?

Mr. Cyr: Nothing further.

The Court: Court will stand in recess. [86]

Reporter's Certificate

I, John J. Parker, certify that I am the Official Court Reporter of the above-entitled Court, and that as such I attended the trial of the consolidated actions of United States of America, vs. One Electronic Pointmaker, also known as the Joker Ma-

chine, Serial Number X550378, being Cause No. 502 of the records of said Court, and United States of America, vs. One Electronic Pointmaker, also known as the Bingo Machine, Serial Number X550518, being Cause No. 503 of the records of said Court, held at Butte, Montana, on January 12, 1956, and reported in shorthand all of the proceedings had at the trial of said consolidated actions; that thereafter I transcribed said shorthand, and that the foregoing is a full, true and correct transcript of the proceedings had at said trial.

Dated this 30th day of January, 1956.

/s/ JOHN J. PARKER,
Official Court Reporter.

[Endorsed]: Filed January 31, 1956. [87]

[Title of District Court and Cause.]

Civil No. 502

DOCKET ENTRIES

1955

- Dec. 6—Filed Libel of Information for condemnation (Issued Monition).
- Dec. 6—Filed Monition and warrant of arrest.
- Dec. 7—Filed Amended Libel of Information.
- Dec. 12—Filed Motion for Publication of Notice of Seizure.
- Dec. 12—Filed Order for Publication.
- Dec. 16—Filed Marshal's Return on Notice of Seizure, attached hereto.

1956

- Jan. 5—Filed Claim of Owner.
- Jan. 5—Filed Answer of James J. Hannifin.
- Jan. 5—Entered record return on monition set for
Thursday, Jan. 12, 1956, at 10:00 a.m.
- Jan. 5—Filed proof of publication.
- Jan. 9—Filed 3 praecipes for U. S. witnesses.
- Jan. 11—Filed 3 subpoenas.
- Jan. 12—Filed 2 praecipes for U. S. witnesses.
- Jan. 12—Entered record of trial, order granting
time for findings and briefs.
- Jan. 12—Filed reporter's notes.
- Jan. 13—Filed subpoena.
- Jan. 31—Filed transcript of evidence.
- Feb. 11—Lodged Libelant's proposed findings of
fact and conclusions of law.
- Feb. 13—Filed brief of plaintiff.
- Feb. 13—Filed affidavit of mailing.
- Mar. 12—Filed brief of Libelee.
- Mar. 12—Lodged Libelee's Proposed Findings of
Fact and Conclusions of Law.
- Mar. 12—Filed Affidavit of Service by Mail.
- Apr. 2—Filed Findings of Fact and Conclusions
of Law.
- Apr. 4—Mailed copies of Findings of Fact and
Conclusions of Law to counsel for respec-
tive parties.
- Apr. 6—Filed and Entered Judgment and Decree
of Condemnation.
- Apr. 6—Filed Judgment Roll.
- Apr. 7—Filed Bill of Costs (\$78.76).

1956

- Apr. 7—Filed Affidavit of Service by Mail, Re:
Copy of Judgment and Decree of Con-
demnation, and Bill of Costs.
- Apr. 20—Filed Notice of Appeal.
- Apr. 20—Mailed Copy of Notice of Appeal to U. S.
Attorney, counsel for Plaintiff.
- Apr. 20—Filed Bond on Appeal.
- Apr. 20—Filed Designation of Record.
- Apr. 20—File Statement of Points.
- May 28—Filed and Entered Order Extending Time
for Filing Record on Appeal and Dock-
eting the Appeal (July 15, 1956).
- May 28—Mailed copies of last above order to
counsel for respective parties.
-

[Title of District Court and Cause.]

Civil No. 503

DOCKET ENTRIES

1955

- Dec. 6—Filed Libel of Information (Issued
Monition).
- Dec. 6—Filed Monition and Warrant of Arrest.
- Dec. 7—Filed Amended Libel of Information.
- Des. 12—Filed Motion for Publication.
- Dec. 12—Filed Order for Publication.
- Dec. 16—Filed Marshal's Return on Notice of
Seizure, attached hereto.

1956

- Jan. 5—Filed Claim of Owner James J. Hannifin.

1956

Jan. 5—Filed Answer of J. J. Hannifin.

Jan. 5—Filed Proof of Publication.

Jan. 5—Entered Record Hearing Return on Motion set for Thursday, Jan. 12, 1956, at 10:00 a.m.

Jan. 9—Filed 3 Praecipes for U. S. Witnesses.

Jan. 11—Filed 3 Subpoenas.

Jan. 12—Filed 1 Praecipe for Subpoena for U. S. Witness.

Jan. 12—Filed 2 Subpoenas.

Jan. 12—Entered Record of Trial and Order Granting Time for Findings and Briefs.

Jan. 31—Filed Transcript of Evidence (In File No. 502).

Feb. 11—Lodged Libelant's Proposed Findings of Fact and Conclusions of Law.

Feb. 13—Filed Brief of Plaintiff (In File No. 502)

Mar. 12—Filed Brief of Libelee.

Mar. 12—Filed Libelee's Proposed Findings of Fact and Conclusions of Law.

Mar. 12—Filed Affidavit of Service by Mail. (Above Papers in File 502.)

Apr. 2—Filed Findings of Fact and Conclusions of Law. (These Papers in File 502.)

Apr. 4—Mailed Copies Findings of Fact and Conclusions of Law to counsel for respective parties.

Apr. 6—Filed and Entered Judgment and Decree of Condemnation.

Apr. 6—Filed Judgment Roll.

Apr. 7—Filed Bill of Costs (\$79.26).

1956

Apr. 7—Filed Affidavit of Service by Mail, Re:
Copy of Judgment and Decree of Con-
demnation, and Bill of Cost.

Apr. 20—Filed Notice of Appeal.

Apr. 20—Filed Bond on Appeal.

Apr. 20—Filed Designation of Record.

Apr. 20—Filed Statement of Points on Appeal.

May 28—Filed and Entered Order Extending Time
for Filing Record on Appeal and Docket-
ing the Appeal (July 15, 1956).

May 28—Mailed copies of last above order to coun-
sel for respective parties.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, E. Warren Toole, Clerk of the United States District Court in and for the District of Montana, do hereby certify to the Honorable, the United States Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 58 pages numbered consecutively from 1 to 58 inclusive, together with the Transcript of Evidence, hereinafter mentioned (in itself consisting of 85 pages, exclusive of its cover, its index page and its Official Court Reporter's certificate page), is a full, true and correct transcript, consisting of the original papers designated by the parties, to wit: Amended Libel of Informations;

Monitions; Marshal's Returns on Notices of Seizure, including such Notices of Seizure; Claims of Owners; Minute Entries of January 5 and 12, 1956; Answers; Minute Entry of January 12, 1956; Findings of Fact and Conclusions of Law; Judgments and Decrees of Condemnation; Notices of Appeal; Bonds on Appeal; Statements of Points on Appeal; Designations of Record on Appeal; Clerk's Docket Entries and the Transcript of Evidence, and also the Orders Extending Time for Filing Record on Appeal and Docketing the Appeals, required by the rules as the Record on Appeal in Civil Cases No. 502, United States of America, Libelant, vs. One Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, Libelee, and No. 503, United States of America, Libelant, vs. One Electronic Pointmaker, also known as the Bingo Machine, Serial Number X550518, Libelee, as appears from the original records and files of said District Court in my custody as such Clerk.

I further certify that the Exhibits, which are being transmitted under Government Bill of Lading No. USCA 26506, being a machine numbered X550378, marked Plaintiff's Exhibit No. 1; a remote control box, marked Plaintiff's Exhibit No. 1A; a machine numbered X550518, marked Plaintiff's Exhibit No. 2; and a remote control box, marked Plaintiff's Exhibit No. 2A, are all of the original exhibits in said cases and that all of the same up to the time of transmittal have been in my custody as such Clerk.

Witness my hand the seal of said District Court
at Butte, Montana, this 5th day of July, 1956.

[Seal] E. WARREN TOOLE,
 Clerk,

By /s/ E. WARREN TOOLE,
 Clerk.

[Endorsed]: No. 15195. United States Court of
Appeals for the Ninth Circuit. James Hannifin,
Claimant of One Electronic Pointmaker, Also
Known as the Joker Machine, Serial Number
X550378, Appellant, vs. United States of America,
Appellee, and James Hannifin, Claimant of One
Electronic Pointmaker, Also Known as the Bingo
Machine, Serial Number X550518, Appellant, vs.
United States of America, Appellee. Transcript of
Record. Appeals from the United States District
Court for the District of Montana, Butte Division.

Filed July 9, 1956.

Docketed July 18, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.



IN THE

United States

Court of Appeals

for the Ninth Circuit

JAMES HANNIFIN, Claimant of One Electronic
Pointmaker, Also Known as the JOKER
MACHINE, Serial Number X550378,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee;

and

JAMES HANNIFIN, Claimant of One Electronic
Pointmaker, Also Known as the BINGO
MACHINE, Serial Number X550518,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Appeals from the United States District Court for the
District of Montana, Butte Division.

JOHN M. McCARVEL
305 Barber-Lydiard Building,
Great Falls, Montana;

EDWIN V. MAGAGNA
Rock Springs National Bank Building
Rock Springs, Wyoming;

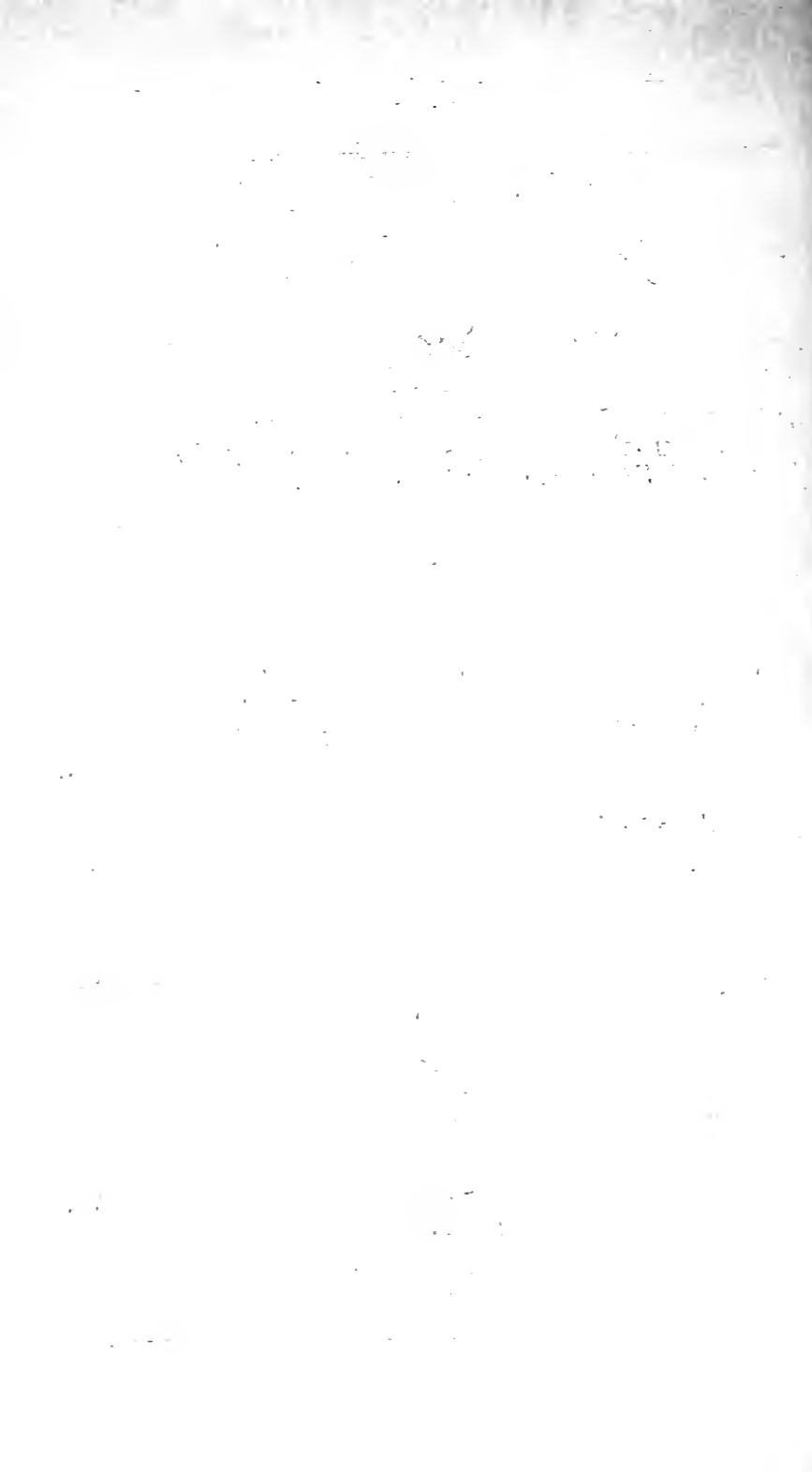
Attorneys for Appellant,
JAMES HANNIFIN.

FILED

Filed , 1956

NOV 1 1956

..... Clerk



IN THE
United States
Court of Appeals
for the Ninth Circuit

JAMES HANNIFIN, Claimant of One Electronic
Pointmaker, Also Known as the JOKER
MACHINE, Serial Number X550378,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee;

and

JAMES HANNIFIN, Claimant of One Electronic
Pointmaker, Also Known as the BINGO
MACHINE, Serial Number X550518,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT

Appeals from the United States District Court for the
District of Montana, Butte Division.

JOHN M. McCARVEL
305 Barber-Lydiard Building,
Great Falls, Montana;

EDWIN V. MAGAGNA
Rock Springs National Bank Building
Rock Springs, Wyoming;

Attorneys for Appellant,
JAMES HANNIFIN.

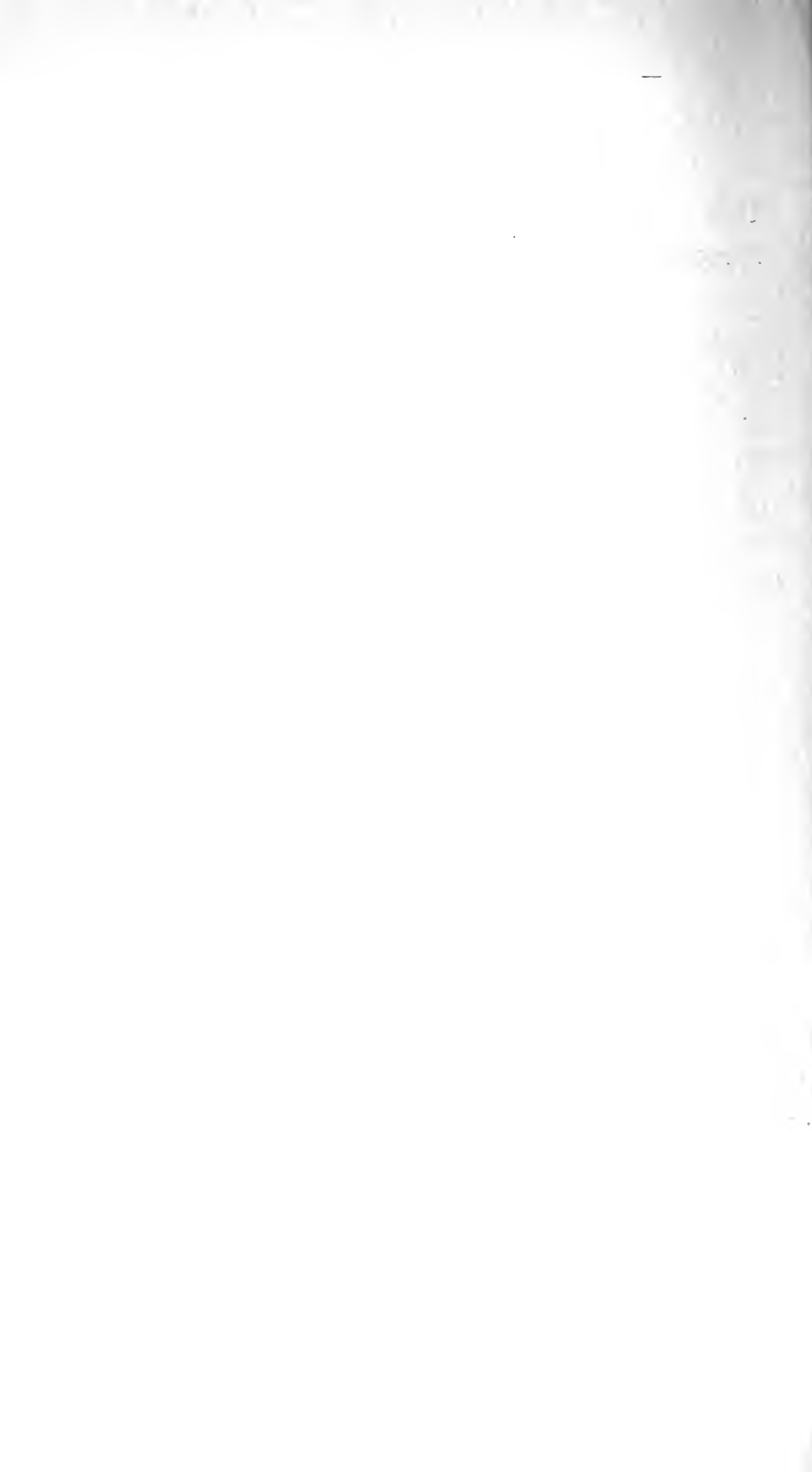
INDEX

	Page
STATEMENT	5
POINTS RELIED UPON ON APPEAL	6
ARGUMENT:	7
I. EVIDENCE	7
II. STATUTES TO BE CONSIDERED	12
III. LEGISLATIVE HISTORY	13
IV. APPLICATION OF STATUTES TO LIBELLEES	18
V. CONCLUSION	26

STATUTES AND CASES CITED

Page

Transportation of Gambling Devices	
Oct.—(15—USC Section 1171 at Seq.)	12
Smith vs. McGrath, Attorney General	
103 Fed. Supp. 286—District of Maryland	20
U. S. vs. 139 Gambling Devices, alias Slot Machines—109 Fed. Supp. 23, East District, Illinois	20
U. S. vs. 5 Gambling Devices	
119 Fed. Supp. 641, North District Georgia	21
U. S. vs. 7 Slot Machines	
119 Fed. Supp. 713, North District, Georgia	21
Alder et al vs. Northern Hotel	
175 Fed. 2nd 619	22
U. S. vs. Walter Korpan	
United States Court of Appeals for the Seventh Circuit—September 28, 1956, No. 11,669	23
Washington Market Co. vs. Hoffman	
101 U. S. 112	24



STATEMENT OF THE CASE

This is an appeal from two identical Decrees of Condemnation made and entered in the United States District Court for the District of Montana, Butte Division on the 6th day of April, 1956. The Hon. W. D. Murray was the presiding Judge.

A Libel of Information was filed against one Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, on the 6th day of December, 1955, and a similar Libel of Information was filed against one Electronic Pointmaker, also known as the Bingo Machine, Serial Number X550518. Thereafter, on the 5th day of January, 1956, James Hannifin intervened and filed his claims to both machines. The cases were consolidated for trial and it was stipulated that the two cases could be tried together, and the evidence adduced as to one Electronic Pointmaker be applied to the other. The cases were tried before the Court without a jury on January 12, 1956, and the Court made its findings of fact and conclusions of law and entered an identical Judgment and Decree of Condemnation in both cases on April 6, 1956, from which the claimant, James Hannifin, makes this present appeal.

The amended Libel of Information states:

"1. That the amended libel of information is filed by the United States of America and prays the seizure and forfeiture of a certain gambling device, as hereinafter set forth, in accordance with the Transportation of Gambling Devices Act. (15 U. S. C., Section 1171, et seq.)."

The question at issue is whether or not the two machines in question are subject to seizure and forfeiture under the provisions of said statutes.

POINTS RELIED UPON ON APPEAL

I. The Court erred in holding and deciding that said Electronic Pointmakers were and are gambling devices within the meaning of Title 15 U. S. C., Section 1171.

II. The Court erred in not strictly construing the Transportation of Gambling Devices Act (Title 15 U. S. C., Section 1171, et seq.), commonly known as the Johnson Act, in view of the fact that said Act is penal in character.

III. The Court erred in holding and deciding that the said Electronic Pointmakers had drums or reels, with insignia thereon as an essential part of said machines.

IV. The Court erred in holding and deciding that said machines were transported in violation of Title 15, U. S. C., Section 1172.

V. The Court erred in reserving a ruling on claimant's objection to the introduction of evidence tending to show libelee machines were used for gambling purposes and not sustaining said objection when made. (Record Page 55).

VI. The Court erred in denying claimant's motion to dismiss at the conclusion of the libelant's case.

VII. The Court erred in not finding that said machines are not gambling devices per se.

VIII. The Court erred in not finding that there was no “direct payoff” from the machines.

IX. The Court erred in not finding that the machines, the libelees herein, can be used for amusement and recreational purposes.

X. The Court erred in not finding that no coin can be inserted in the machines, libelees herein ,to operate the machines.

XI. The Court erred in not finding that the counter device, or totalizer, was not an essential part of the machines, in the intent of Congress in passing the “Johnson Act”, and have nothing to do with the operation of the machine, but merely record the score.

XII. The Court erred in not dismissing the amended libel of information as not being within the prohibitive scope of the Johnson Act.

ARGUMENT

I. EVIDENCE

The evidence in this case can be briefly summarized as follows:

First Witness Kent Hutcheson, called on behalf of libelant, (Record Page 43), Special Agent, F.B.I., identified machines, testified as to their seizure and that he had seen persons play the machines.

Second Witness Hubert J. Massman, called on behalf of libelant, (Record Page 51), Assistant Attorney General, State of Montana, testified that he had observed machines of similar type in a number of public places being played, and that they were used for gam-

bling. That at the time of his investigation he was in the employ of and acting for the Attorney General of the State of Montana.

Third Witness Ole Nelson, called on behalf of libelant, (Cecord Page 60), bartender at Eagle's Lounge, Butte, Montana. Testified that machines in question were at Eagle's Lounge and were played by patrons. That patrons paid five (5) cents per play, and if player had any games left he was paid a nickel for each one. That most of the time player played what he had coming.

Fourth Witness Glen Tarbox, called on behalf of libelant, (Record Page 63), of Missoula, Montana, a part owner of a radio and television repair shop. Testified that he had experience with working mechanism of slot machines, pinball machines, and automatic phonographs, between years 1937 to 1952. Testified that there was some similarity between slot machines and machines in question. Upon cross examination that there were many differences between slot machines and machines in question, and at Record Page 72, testified as follows in regard to the counter device, and reels and drums:

“Q. In that connection with the slot machines you have worked on, did any of them have a counter device similar to this one?

A. No.

Q. That counter device has not been used in slot machines?

A. I have never seen one.

Q. Now, with reference to these plates here that

turn around, are there any markings or insignia on those?

A. I didn't see any.

Q. Now, what markings or insignia were thereon the reels or drums used in the slot machines?

A. You mean on the face of the drum, you mean?

Q. On the reels and drums of the slot machines, what insignia did you find on that type machine?

A. They varied, they had fruit symbols and bells.

Q. With reference thereon to the reels or drums you saw in slot machines that had insignia thereon, are there any of that type of reels or drums in this assembly?

A. The large drums in the slot machine? No, there are not."

He also testified that the machines could be played without the counter device or totalizer. That the counter device had nothing to do with the operation of the machine but merely kept track of the plays. (Record Pages 73, 74, 75)

(Testimony of Glen Tarbox)

"Q. Actually, what does the counter do, insofar as the machine is concerned, what does it purport to do, or what does it actually, physically do?

A. It gives the person playing the machine a record of how many free plays he has.

Q. It is a recorder or counter?

A. Right.

Q. That counter doesn't determine how many free plays he gets or what his score is, it merely counts how many times it has been played, and then records if the device gives him back some plays, and records how many it gives back?

A. Right.”

Also testified that similar counter devices were used on pinball games, bowling games, electric phonographs.

He also stated in answer to Court's questions, Record Page 77, that the reel or drum that was commonly called the reel or drum of the slot machine, was the reel or drum that revolved, had insignia on it, and then came to a stop.

He also testified that there are no slots for insertion of coin in machines in question, or any slots for pay out of coins, and that they did not contain any mechanism that could be used for this purpose.

Fifth Witness James J. Hannifin, called in behalf of claimant (Record Page 86), testified that he was the owner of the machines in question.

Sixth Witness Bernard T. McManus, called in behalf of claimant, (Record Page 88), Testified that he designed the machines in question. That the idea was first conceived in fall of 1949, and made application for letters patent in spring of 1950, and patent was issued in 1951.

That it was designed and patent applied for before enactment of the Johnson Act, and was not designed for the purpose of evading the terms of the Johnson Act.

That in the Wyoming case there were introduced two machines, one referred to as “Exhibit A” which had reels and drums with insignia thereon that the slot machines were using at the time, and one referred

to as "Exhibit B" which was similar to governments "Exhibit 1" in the present case.

Testified that the counting device on present machines were not used on slot machines, they are purchased on the market, are used on many other machines, have nothing to do with the operation of the machines other than recording the score, and machine could be operated without the counting devices.

Testified that there were no slots for insertion of coins in machines in question, or any slots for pay out of coins, and that they did not contain any mechanism that could be used for this purpose.

Testified that the machines did not have any reels or drums with insignia thereon similar to those used in slot machines.

It should also be noted that the machines, government Exhibits 1 and 1-A and 2 and 2-A were offered and received in evidence and it was agreed that the two cases could be tried together and the evidence adducted as to one electronic pointmaker could be applied to the other.

There was no rebuttal evidence offered by the government, however the government requested the Court to take judicial notice of the Report of the House of Representatives, No. 2769, in the 81st Congress, and the report of the Senate, No. 1482, 81st Congress, and of unreported decision in the Case of U. S. vs. One Joker Type Slot Machine, Third Division, Territory of Alaska.

II. STATUTES TO BE CONSIDERED

The statutes herein involved are designated as the Transportation of Gambling Devices Act. (15 U. S. C., Section 1171, et seq.). Section 1171, U. S. C. Title 15, so far as is here material, reads as follows:

“Definitions

As used in this chapter—

(a) The term “gambling device” means—

- (1) Any so-called “slot machine” or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; . . .”

Subsection (2) of the same section refers to coin-operated machines.

Subsection (3) refers to any subassembly or essential part intended to be used in connection with such machine or mechanical device.

Section 1172, U.S.C., Title 15 makes unlawful the transportation of any such gambling device interstate, with certain exceptions not material herein.

Section 1173, U.S.C., Title 15, provides for the registration of manufacturers and dealers of gambling devices.

Section 1174, U.S.C., Title 15, provides for the labeling and marking of shipping packages containing gambling devices.

Section 1175, U.S.C., Title 15, prohibits manufacturing, repairing, selling, possessing, etc. of gambling devices within the "Indian Country" as defined in Section 1151, U.S.C., Title 18, or "within the special maritime and territorial jurisdiction of the United States" as defined in Section 7 U.S.C., Title 18.

Section 1176, U.S.C., Title 15, provides the penalties for violation of the aforementioned sections, to-wit: \$5,000.00 fine or imprisonment not more than two years, or both.

Section 1177, U.S.C., Title 15, provides for confiscation of gambling devices as defined by Section 1171, and forfeiture. The material part of this section, in so far as the present case is concerned is the first sentence:

"Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this chapter shall be seized and forfeited to the United States."

III. LEGISLATIVE HISTORY

The Transportation of Gambling Devices Act, Title 15, U.S.C., Section 1171, et seq., was enacted January 2, 1951.

The bill was introduced as Senate File 3357 by Senator Johnson of Colorado. It was reported out

by Committee, Senate Report No. 1482, a copy of which has been furnished the Court, passed the Senate and referred to the House. The House of Representatives Committee recommended certain amendments, as set forth in House Report No. 2769, a copy of which has been furnished the Court. The Bill was passed by the House as amended. It subsequently went to conference and the conference report was agreed to by Senate. (Congressional Record Senate Pages 16,865 to 16,903.)

The bill was drafted and enacted to prohibit the interstate shipment of Slot Machines.

An examination of these reports and the Congressional Record indicate that the Committees and members of Congress had difficulty in arriving at the definition of "Gambling Device".

The problem is set forth at last paragraph of page 6 of Senate Report No. 1482, in a letter to Senator Johnson calling his attention to the fact that the definition in Senate version was too broad;

"For example, an ordinary bowling alley could conceivably come within the definition of a gambling device since there is an element of chance involved and the user or player may become entitled to receive something of value. In fact, many bowling alleys do offer prizes and, thus, could conceivably be prohibited from shipment in interstate commerce if S. 3357 would become law. Obviously it was not the intent to include this sports-amusement game.

"There is no game known to man which does not have an element of chance, and, further, the player of any game could conceivably become entitled to

receive something of value if anyone wishes to offer a prize.”

The House Committee Amendments are set forth at page 6 of Report No. 2769. The one as to definition being as follows:

“COMMITTEE AMENDMENTS

“Section 1 defines gambling devices. As defined in the bill passed by the Senate, ‘Gambling device’ means:

Any machine or mechanical device or parts thereof, designed or adapted for gambling or any use by which the user as a result of the application of any element of chance may become entitled to receive, directly or indirectly, anything of value.

“In their testimony before your committee, representatives of the Attorney General stated that this definition could possibly be construed to include pinball machines and similar devices which are played purely for amusement and which do not have pay-off devices which return to the player anything of value. In his communication, addressed to the chairman of your committee, dated June 1, 1950, the Attorney General’s representative pointed out, however, that it was the intention of the Department of Justice that machines manufactured and used purely for amusement should be excluded from the provisions of this bill.

“In view of this testimony and because of its intention to exclude pinball machines and similar amusement machines as well as certain machines and devices commonly used, for instance, at carnivals and livestock shows, your committee decided to adopt a definition of gambling device different from the one contained in the Senate bill. Gambling device is defined by the committee amendment as:

- (1) Any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive as the result of the application of an element of chance, any money or property; or
- (3) Any subassembly or essential part intended to be used in connection with any such machine or mechanical device."

The bill was discussed by the Senate at the time the conference report was being considered. This appears in Congressional Record Senate, pages 16,685 to 16,903. We like to call the Court's attention to several portions of the discussion, between Senator Johnson the sponsor of the bill, and others. Senator Taft and Sen. Johnson, Page 16,901, Column 2:

"MR. TAFT. I am not so much concerned with slot machines as I am with pari-mutuel machines.

"MR. JOHNSON of Colorado. The bill does not touch any other machines. It does not touch pari-mutuel machines. The language in the House bill is narrower.

"MR. TAFT. This is the language to which I was referring:

- (1) Any so-called slot machine or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, *** (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

“There is nothing in that language which refers to any coins. Subsection (1) (A) speaks of coins. Subsection (1) (B) does not refer to coins. It would seem to me, therefore, that a pari-mutuel machine might be fairly considered to be operated with a drum or reel. The bill would cover roulette machines, and it might be broad enough to include pari-mutuel machines. I do not know anything about pari-mutuel racing machines. Some persons in my State who are interested in pari-mutual racing seem to have become quite concerned about the bill.

“MR. JOHNSON of Colorado. Pari-mutuel machines do not use any drum or mechanical devices like those used in slot machines.

“MR. TAFT. It must be some sort of machine.”

Senator Holland and Senator Johnson, Page 16,902, Column 2:

“(MR. HOLLAND) I wish to be very sure that that language does not permit the application of the bill to be a totalizer used in a pari-mutuel racing, which is nothing in the world but a complex computing machine or device. The question which the Senator from Florida wishes to address to the Senator from Colorado at this time is this:

It is not true that subdivision (B) in section 1 of the conference bill cannot in any situation apply to a totalizer because of the fact that subdivision (B) includes, as a necessary element, that provision stated in the words ‘as the result of the application of an element of chance,’ whereas in the use and operation of a totalizer there is and can be no element of chance whatever, the machine being purely a computing machines, which, using the figures and facts which are committed to it, delivers as a result of its computation, fixed and certain results, and their being no element of chance whatever entering into the operation of the computing

machine which is referred to generally as a totalizer?

“MR. JOHNSON of Colorado. Mr. President, the Senator from Florida has stated the case very clearly. The bill does not affect in any way any adding machine or any computing machine of any description or kind. It cannot do so. The sentence which begins with ‘(B)’ or line 20 is part of the whole sentence and is controlled by the language preceding it. There is nothing in the conference reports which in any way effects in the slightest degree any of the paraphernalia used in pari-mutuel seems to me that the description which is given in the bill is clear, and that it is clear that it applies only to slot machines.”

“

“MR. JOHNSON of Colorado. The Senator is correct. The bill would not in any way affect any machine, or any part of a machine, used for calculating purposes. I say again that the bill would not in any way affect any paraphernalia used in pari-mutuel betting—either repairs, parts, or old machines.”

IV. APPLICATION OF STATUTES TO LIBELLEES

The Amended Libel of Information, paragraph 3, reads as follows:

“3. That said Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, was transported in violation of 15 U.S. C., Section 1172, in that said Electronic Pointmaker, also known as the Joker Machine, Serial Number X550378, was a gambling device within the meaning of 15 U.S.C., Section 1171, in that it was a machine and mechanical devise, an essential part of which is a drum or reel, with insignia thereon, by the operation of which a person may become entitled to receive, as

the result of the application of an element of chance, money and property, when said gambling device was transported to Butte, Montana, from Chicago, Illinois, as aforesaid.”

In order for a non-coin operated machine to be within the prohibitive scope of the statute it must contain:

- (1) A drum or reel with insignia thereon, as contemplated by Congress; and
- (2) Which are an essential part of the machine within the meaning of the statute.

As to item (1), an examination of the legislative history definitely indicates that Congress was talking about the:

Drums or reels with insignia thereon which were used on slot machines.

It should be noted that Glen Tarbox, called as the expert witness of libelant, specifically testified, (Record Page 72) that the counter device used in machines in question has not been used in slot machines, and that there were no drums or reels with insignia thereon, on these machines of the type found on slot machines.

We have checked Webster's New International Dictionary of the English Language, Second Edition—Unabridged 1955, for the definitions of the words used. The applicable definitions as we read them are as follows:

“Drum—Page 791-792, 4 G)**—**A revolving cylinder or barrel, whether hollow or solid, that acts, or is acted upon by something exterior to itself.”

“Reel—(Page 2090-2091, -1—A revolving device it is usually a frame consisting of a horizontal axle with spokes radiating from a hub near each end, and horizontal bars or slots connecting these in pairs.”

“Insignia—1. Distinguishing marks of authority, office or honor, badges, emblems; as the insignia of royalty or an order. 2. Typical and characteristic marks or signs by which anything is distinguished; as the insignis of a trade.”

It is interesting to note that under the definition insignia that no mention is made of numbers or numerals.

The statute being of a penal character it should be strictly construed in favor of the libelee.

The following cases in regard to the foregoing statute (Johnson Act) specifically set forth that the statute is highly penal in character and should be strictly construed:

In the case of **Smith vs. McGrath, Attorney General—103 Fed. Supp. 286, District of Maryland**, the Court states at page 288:

“There are two well known elementary rules of construction that are applicable here. One is that words used in the statute are to be understood in their ordinary meaning and acceptation unless the context of the act as a whole reasonably is highly penal in character and therefore should be strictly construed.”

In the case of **U. S. vs. 139 Gambling Devices, alias slot machines, 109 Fed. Supp. 23, East District, Illinois**, the Court states at page 26:

“Forfeitures are not favored and they should be enforced only when within both the letter and spirit

of the law. *United States v. One 1936 Model Ford Coach*, 307 U.S. 219, 226, 59 S.Ct. 861, 83 L.Ed. 1249. Forfeiture statutes should be strictly construed. *C. C. Co. v. United States*, 5 Cir., 147 F.2d 820; *The Leme*, 77 F.Supp. 773, 777.”

In the case of **U.S. vs. 5 Gambling Devices**, 119 Fed. Supp. 641, North District, Georgia, the Court says at page 644:

“The Act of January 2, 1951, Title 15, US CA-S-1171, et seq. prohibiting the transportation of gambling devices in interstate commerce, was passed pursuant to the Constitutional power of Congress to regulate interstate commerce, and being penal in character must be strictly construed.”

In case of **U.S. vs. 7 Slot Machines**, 119 Fed. Supp. 713, North District, Georgia, the Court set forth the same statement as contained in case of *U.S. vs. 5 Gambling Devices*, Supra.

As to item (2) the word **essential**, as used in this statute must be construed to mean that the drum or reel be more than just a part of the machine and must be actually necessary to the operation of the machine, otherwise the statute would have the same meaning without the use of the word “**essential**”.

In the case of **Washington Market Co. v. Hoffman** 101 U.S. 112, the Court states the rule as follows:

“It is a cardinal rule of statutory construction that significance and effect shall if possible, be accorded to every word. As early as in Bacon’s Abridgement, Section 2, it was said that ‘A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word, shall be superfluous, void, or insignificant’. This rule has been repeated innumerable times. Another

rule equally recognized is, that every statute must be construed with the whole, so as to make all parts harmonize, if possible, and give meaning to each.”

In case of **Alder, et al. vs. Northern Hotel** 175 Fed. 2nd 619, is to the same affect:

“In construing the language of Section 205, we commence with the rule that the courts are not at liberty to construe any statute so as to deny effect to any part of its language. ‘It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word * * * Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all parts harmonize, if possible, and giving meaning to each.’ *Market Co. v. Hoofman* 101 U.S.—112, 115, 116, 25 L. Ed, 782, and *Ex. Parte National Bank*, 278 U.S., 101, 104, 49 S. ct. 43, 73 L. Ed. 203. That is to say, every word used is presumed to have meaning and purpose, for Congress is not to be thought by the courts to have used language idly.

We checked Webster’s New International Dictionary of the English Language, Second Addition—Unabridged 1955, and the applicable definition as we read it is as follows:

“**Essential** — (Page 874) 2. Of or pertaining to essence, or the essence of something, belonging to, or relating to, the inner or constituent character of anything, as, an essential right or part. 3. Important, in the highest degree, indispensable.”

We find the following definition in *Words & Phrases*, Volume 15, Permanent Edition, Page 245:

“ ‘Essential’ means indispensably necessary, important in the highest degree, requisite. *Pittsburg Iron & Steel Foundries Company vs. Seaman-Sleeth Company*, D. C. Pa. 236 F. 756, 757. *Reddell vs.*

Penn R. Co., 106A 80, 81, 262. Pa. 582. 'Essential' as indispensable' ”.

It should also be noted in this regard that Glen Tarbox, called as the expert witness of libelant, testified (Record Pages 73, 74, 75) that the machines could be played without the counter device or totalizer, that the counter device had nothing to do with the operation of the machine but merely kept track of the plays.

In the recent case of **U.S. vs. Walter Korpan, rendered In The United States Court of Appeals for the Seventh Circuit, September 28, 1956, No. 11669**, the Court in construing a statute relative to taxation of coin operated gaming devices the Court states:

“If the dictionary definition of ‘slot machine’ were applied, it is clear that these machines would be covered by the definition of coin-operated gaming device.

“A machine the operation of which is started by dropping a coin in a slot.” Webster’s New International Unabridged Dictionary, 2d Ed. 1955.

When this definition is considered with the choice of, language employed by Congress i.e., “so-called ‘slot’ machine which operates by means of the insertion of a coin, token or similar object ***,” it would appear that Congress intended a more restrictive meaning for the term “slot machine”.

The term “so-called” is a modifying word implying doubt as to the correctness or propriety of so designating a thing. See Webster’s New International Unabridged Dictionary, 2d Ed. 1955. And the use of quotation marks to set off the word “slot” indicates that Congress did not intend the language “so-called ‘slot’ machine” to be as com-

prehensive as the dictionary definition of "slot machine." Every word used in a statute is presumed to have a meaning and purpose, and, if possible, every word must be accorded significance and effect. **Washington Market Co. v. Hoffman**, 101 U. S. 112; **Alder v. Northern Hotel Co.**, 7 Cir., 175 F. 2d 619. We conclude, therefore, that not only must these machines incorporate the three incidents noted above, but they must also be "so-called" 'slot' machines."

Since the term "so-called 'slot' machine" is not adequately defined in Section 4462 nor elsewhere in the Internal Revenue Code, it becomes necessary to resort to extrinsic evidence in order to accord meaning and purpose to this language.

The defendant in urging this point suggests that the term "slot machine" as used in Section 4462 refers specifically to a machine in which the insertion of a coin releases a lever or handle which, in turn, when pulled activates a series of spring-driven drums or reels with various insignia painted thereon, usually bells and fruit (colloquially called a "one-armed bandit").

There is force to this conclusion when the language thus employed is reviewed in light of the legislative history of Section 4462.

Before reviewing the legislative history of this statute it would be well to consider the argument advanced by the Government that the statute is clear and unambiguous, and that consequently there is no necessity for looking behind the words of the statute in order to determine what the intent of Congress was. We do not believe, however, that these words are sufficient in and of themselves to determine the purpose of the legislation. In such an event "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'." **United States v. Ameri-**

can Trucking Associations, Inc., 310 U.S. 534 at pages 543-44.”

The Court in the case of U. S. vs. Walter Korpan, *supra*, makes specific reference to the statute involved in the case at issue and states:

“Statutes which relate to the same thing or same class of things are often helpful in construing a particular statute. See *Great Northern Ry. v. United States*, 315 U.S. 262.

The Johnson Act, passed on January 2, 1951, prohibits the interstate shipment of gambling devices which it defines as follows:

“(1) any so-called ‘slot machine’ or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon and (A) which when operated may deliver, as a result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

“(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property * * *.” 15 U.S.C.A. Sec. 1171.

If this definition were applied to the machines here involved it is clear that they are without its scope. A drum or reel with insignia thereon is not an essential part of defendant’s machines, nor are these machines designed and manufactured so that when operated they may deliver any money or property.”

It should be noted that the machines in the *Korpan*

case contained a counter device or totalizer of similar type to that on the machines in the case at bar, and in addition were operated by insertion of a coin, but the Court specifically ruled that they were without the scope of the Johnson Act because:

“If this definition were applied to the machines here involved it is clear that they are without its scope. **A drum or reel with insignia thereon is not an essential part of defendant’s machines**, nor are these machines designed and manufactured so that when operated they may deliver any money or property.”

V. CONCLUSION

The machines in question are not as set forth in paragraph 3 of the Amended Libel of Information, a gambling device within the meaning of 15 U.S.C. Section 1171, in that they are not machines, or mechanical devices, an essential part of which is a drum or reel for the following reasons:

1. The machines do not contain drums or reels with insignia thereon;
2. The counter device or totalizer on the machine claimed by the libelant to be drums or reels:
 - (A) Are not drums or reels according to the ordinary use of words.
 - (B) Are not drums or reels as contemplated by Congress at the time of the passage of the act.
 - (C) Are not an essential part of the machines in that they have nothing to do with the operation of the machines, but merely record the result after the machine is played in the same manner as a totalizer

arrives at the results of the pari-mutuel betting at a horse race.

3. The machines are not gambling devices per se, for the following reasons:

(A) The machines can be used for amusement and recreational purposes.

(B) No coin can be inserted to operate the machines.

(C) There is no direct "pay-off" from the machines.

We, therefore, submit that the two Electronic Pointmakers herein are not within the prohibitive scope of the statute, and that the Libel of Information should be dismissed.

Respectfully submitted,

JOHN M. McCARVEL
305 Barber-Lydiard Building,
Great Falls, Montana

EDWIN V. MAGAGNA
Rock Springs National Bank Bldg.
Rock Springs, Wyoming
Attorneys for Appellant,
James Hannifin.



IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

JAMES HANNIFIN, Claimant of One Electronic Pointmaker,
Also known as the JOKER MACHINE,
Serial Number X550378, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee;
and

JAMES HANNIFIN, Claimant of One Electronic Pointmaker,
Also known as the BINGO MACHINE,
Serial Number X550518, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

BRIEF OF APPELLEE

Appeals from the United States District Court for the District
of Montana, Butte Division.

KREST CYR

United States Attorney
Federal Building,
Butte, Montana;

DALE F. GALLES

Assistant U. S. Attorney
Federal Building,
Butte, Montana;

MICHAEL J. O'CONNELL

Assistant U. S. Attorney
Federal Building,
Butte, Montana;

FRANK M. KERR

Assistant U. S. Attorney
Federal Building,
Butte, Montana

ATTORNEYS FOR APPELLEE,
UNITED STATES OF AMERICA.

Filed, 1956

....., Clerk

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

JAMES HANNIFIN, Claimant of One Electronic Pointmaker,
Also known as the JOKER MACHINE,
Serial Number X550378, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee;
and

JAMES HANNIFIN, Claimant of One Electronic Pointmaker,
Also known as the BINGO MACHINE,
Serial Number X550518, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

BRIEF OF APPELLEE

Appeals from the United States District Court for the District
of Montana, Butte Division.

KREST CYR
United States Attorney
Federal Building,
Butte, Montana;

DALE F. GALLES
Assistant U. S. Attorney
Federal Building,
Butte, Montana;

MICHAEL J. O'CONNELL
Assistant U. S. Attorney
Federal Building,
Butte, Montana;

FRANK M. KERR
Assistant U. S. Attorney
Federal Building,
Butte, Montana

ATTORNEYS FOR APPELLEE,
UNITED STATES OF AMERICA.

INDEX

	Page
APPLICATION OF TITLE 15 U. S. C. A., §1171, ET SEQ.	1
APPLICATION OF RULE 52 (a) FEDERAL RULES OF CIVIL PROCEDURE.....	8
UNITED STATES VS. WALTER KORPAN.....	9
CONCLUSION	10

STATUTES AND CASES CITED

Title 15, U. S. C. A., §1171, et seq.....	1, 8, 9, 10
Report of Congress, 81st Congress, Second Session, Report No. 2769, page 7.....	2
United States v. Robert J. Ansani, et al. Co-partners d/b/a Taylor & Company, 138 F. Supp. 451.....	2
Cabell v. Markham, 18 F. 2d. 737, 739.....	4
City of Kalamazoo v. Baklema et ux. S. C. Mich., 1930, 233 N. W. 325, 326.....	5
McCulloch v. Maryland, 4 Wheat, 316, 4 L. Ed. 579....	6
Robinson v. Larue, C. A. Tenn. 1941, 156 S. W. 2d 359	7
Peek et al. v. Brush, S. C. of Errors, Conn. 1916 98 Atl. 561.....	7
U. S. v. One Joker Type Slot Machine, unreported....	8
U. S. v. Three Trade Boosters, unreported.....	8
Rule 52 (a) Federal Rules of Civil Procedure.....	8-9
Gamewell Company v. City of Phoenix, 216 F. 2d, 928	9
U. S. v. Gypsum Co., 1948, 333 U. S. 364, 395.....	9
Graver Tank & Mfg. Co., Inc., v. Linde Air Products Co., 1949, 336 U. S. 271, 275.....	9
Lew Wah Fook v. Brownell, 218 F. 2d, 924.....	9
Carr v. Yokohama Specie Bank, Ltd., 211 F. 2d, 251..	9
U. S. v. Walter Korpan, 7th Cir. Court.....	9

APPLICATION OF TITLE 15
U. S. C. A. §1171, ET SEQ.

Two questions were raised by the pleadings in these cases. One, are the Pointmakers gambling devices, by the operation of which a person may become entitled to receive, as a result of the application of an element of chance, money; and two, is there a drum or reel with insignia thereon, which is an essential part of these machines?

As to the first question, the Court had before it the machines and observed that they have the appearance of slot machines. (Exhibits 1, 1A, 2 and 2A.) The Court may also observe the play of the machine, and although technically differing in some respects with a mechanical slot machine, it is obvious that it is the same kind of machine. (Tr. 61, 62, 63.) The Court had an opportunity to hear the machine while being operated. The same sounds as the old-type mechanical slot machine were to be heard. In short, it looked like a slot machine, operated like a slot machine, and sounded like a slot machine, and the testimony of the Government's witnesses, which was not controverted, was to the effect that the claimant, James Hannifin, had stated that all of these machines of which he had knowledge were used as gambling devices, with the possible exception of machines located at the Elks' Club, and as to these, Hannifin stated that he had no information. (Tr. 46.) An Assistant Attorney General of the State of Montana, together with an associate, played or observed the play of numerous of these machines in the City of Butte and vicinity, all of which he

testified were used as gambling devices. The two machines which are here involved were taken from the Eagle Lounge in Butte and Ole Nelson, the bartender of said lounge, testified that winnings were paid off in cash over the bar. (Tr. 61, 62, 63.) In this regard, we wish to point out to the Court that it is not necessary that the machine itself deliver the prize, but only that the person operating the machine may become entitled to receive money. In this regard, we call the Court's attention to page 7 of the Report of Congress, 81st Congress, Second Session, Report No. 2769, page 7, where it is observed:

"If they (slot machines) are not equipped to deliver money or property mechanically, the winnings, if any, indicated on the machine are usually paid over the counter by the owner of the premises on which such slot machines are operated, or his employees."

which is the situation in this case. While the machine itself did not deliver the money if a win were indicated on the drums or reels on the face of the machine, the player was entitled to receive the money equivalent of those numbers.

An observation of the machine in play, with the accompanying testimony of the Government's witnesses and the stated purpose of Congress in enacting the statute measured by mature men in the light of their experience, leads to the unavoidable conclusion that the machines involved in this case are gambling devices which have been cleverly designed and constructed for the purpose of evading the Laws of the United States. In the Case of *United States v. Robert J. Ansani, et al. co-partners doing business as Taylor and Company*, 138 F. Supp. 451, decided in the

Northern District of Illinois on January 26, 1956, the Court holds, in connection with the determination that a Trade Booster is within the purview of the Johnson Act, that a slot machine equipped with a Trade Booster is a gambling device, and not an amusement mechanism. The Trade Booster is an electrical device which when attached to the old-type slot machine made a machine which was very similar in operation to the Pointmakers, in that the attachment of the Trade Booster to the slot machine removed the necessity for the use of coins and the entire machine was remotely controlled, with the Trade Booster attachment. The Court said:

“The defendants argue that a slot machine is not a gambling device, but an amusement device, once it is attached to a Trade Booster. The short answer to this contention is that a person plays a slot machine for the same reason that he does any other gambling device, and that is, to win a prize in money or property. There is nothing amusing about merely playing a slot machine in order to see what insignia comes up in the reels. Whatever amusement is involved is derived from the expectation of ‘hitting the jackpot’ and the possibility of winning the jackpot makes a slot machine, altered or unaltered, a gambling device. Indeed, few people would play a slot machine if they knew that, win or lose, there would be no winnings. Furthermore, the legislative history of the instant Act clearly reveals that a slot machine equipped with a Trade Booster is a gambling device and not an amusement mechanism. The defendants run squarely into the legal maxim that one cannot do indirectly that which he is forbidden to do directly.”

The Court also stated:

“An object is that which it is in objective reality. If, in placing a label or name on that object by which

it later will be known, a word or term is chosen that described that object's accidental qualities, rather than those qualities that the object has of its very essence, then that object does not cease to be that which it is in objective reality merely because those accidental qualities are late removed. The label or name by which that object is known succeeds, by common usage, to mean that which it is in objective reality. Thus, in naming that which was to be known as a 'slot machine,' the word 'slot' describes an accidental quality of that which is now known as a 'slot machine' and does not describe that which a slot machine has of its very essence. It makes little difference, therefore, whether a slot machine has been disslotted or not, as that machine continues to be a slot machine altered or not."

We submit to the Court that the Pointmakers are a mechanical device by operation of which a person may become entitled to receive as a result of the application of an element of chance any money or property; which raises the question as to whether the drums or reels with insignia thereon (here numbers) are an essential part of these machines. Appellants contend "essential" to be the equivalent of "indispensable;" although this construction appears in some dictionaries, the weight of legal authority appears to favor the used of modern interpretations such as "necessary," "beneficial," or something without which the subject matter to which the word applied would be incomplete.

In connection with dictionary definitions, the opinion of Judge Learned Hand, *Cabell v. Markham*, 18 F. 2d, 737, 739, is of interest. Commenting upon the construction of words, he stated:

"Courts have not stood helpless in such situations; the decisions are legion in which they have refused to

be bound by the letter, when it frustrates the patent purpose of the whole statute (cases cited). Of course, it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing; be it a statute, a contract, or anything else. But it is one of the surest indices of a mature and developed Jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning."

The purpose of the statute here in question is to prohibit transportation of gambling devices in interstate commerce. No sympathetic or imaginative discovery is here needed to determine that the legislative intent was to ban interstate shipment of devices such as the "Jokers" or "Pointmakers." To hold that the temporary removal of a part or parts of a device clearly within the purview of the Act causes it to lose its illegal character is nothing short of an invitation to evasion of the law. Thus, to give a restrictive connotation to the word "essential" as used in the Act would be to defeat the very purpose for which it was passed.

The Courts have held that the words "essential" and "necessary" are synonymous, and mean something less than indispensable. In *City of Kalamazoo v. Baklema et ux.*, S. C. Mich., 1930, 233 N. W. 325, 326, the Court had under consideration the meaning of the word necessary in connection with the taking of private land for public use. The State Constitution provides that this may not be done without the necessity therefor being first determined. The charter of the plaintiff provided that it might, when

deemed essential, purchase or condemn private property for public use. It was contended that there is a difference between the meaning of the two words and the Court below wrongly used them interchangeably. The Court stated "lexicographers defined 'necessary' as 'essential' and 'essential' as 'necessary'," quoting Chief Justice Marshall in the case of *McCulloch v. Maryland*, 4 Wheat, 316, 4 L. Ed 579:

"Does it (necessary) always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another; to employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justified. The word 'necessary' is one of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind received of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several

phrases. . . . This word, then, like others, is used in various sense; and in its construction, the subject, the context, the intention of the person using them, are all to be taken into view."

In *Robinson v. Larue*, C. A. Tenn. 1941, 156 S. W., 2d 359, in construing the word "necessary" as used in the Fair Labor Standards Act held that as used in the Act the word "necessary" did not mean indispensable but meant essential and beneficial.

Another construction of the words "essential parts" is to the effect the essential parts of a building may be said to be those without which, as designed and planned, it would be incomplete. *Peek et al. v. Brush* (S. C. of Errors, Conn. 1916, 98 Atl. 561). Thus, it might well be argued that while a brake is essential to the safe operation of an automobile, it is indispensable; that running hot water is necessary to the full enjoyment of modern living but it is not indispensable. The conclusion follows that the reel in the gambling devices in question is not indispensable to its mechanical operation, but is essential to provide the attraction which causes persons to spend money playing it.

That the drums or reels on these Pointmakers were necessary is not subject to argument, because the man who designed the machine stated in his testimony that he did not put any parts in the machine which were not necessary, (Tr. 108, 110), which was further corroborated by the testimony of Mr. Tarbox who stated that the drums or reels were an essential part of these machines. (Tr. 79.) We provided the District Court, with unreported decisions pertaining to this type of machine or wherein the Court makes statements about similar devices. These

are *United States v. One Joker Type Slot Machine*, which was decided in the Third Division, Territory of Alaska, where the Court held a Joker Type slot machine to be a gambling device. The case of *United States v. Three Trade Boosters*, Civil Action No. 5097, Middle District of Pennsylvania. In addition, we provided the District Court with a book entitled the "Attorney General's Conference on Organized Crime" which is referred to in the Congressional reports which were also furnished, being Senate Report No. 1482 of the 81st Congress, Second Session, and House of Representatives Report No. 2769, of the 81st Congress, Second Session.

APPLICATION OF RULE 52 (a), FEDERAL RULES OF CIVIL PROCEDURE

This rule provides, in relevant parts:

"In all actions tried upon the facts without a jury . . . the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . . Requests for Findings are not necessary for purposes of review. Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses. . . ."

The District Court in this case tried the same on the facts without a jury and filed written findings of fact and conclusions of law directing the entry of an appropriate judgment, wherein the Court found all of the facts necessary for the application of Title 15, U. S. C. A. §1171, and specifically found that each of the Pointmakers "were and are a machine and mechanical device." and that "there was and is as an essential part of each Electronic Pointmaker a drum or reel appearing on the face of each with

insignia thereon, consisting of numerals.” and “that by the operation of the said Electronic Pointmakers, a person may become entitled to receive as the result of an element of chance, money.”

As this Court stated in *Gamerwell Company v. City of Phoenix*, 216 F. 2d, 928:

“The Findings stand before us with the presumption of validity unless they are clearly erroneous. (Rule 52 (a), Federal Rules of Civil Procedure.) The object of the clause as to the effect of findings is to give to findings the effect which they formerly had in equity. *United States v. Gypsum Co.*, 1948, 333 U. S. 364, 395. The aim is to: ‘ . . . make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only “clearly erroneous” findings.’ *Graver Tank & Mfg. Co., Inc., v. Linde Air Products Co.*, 1949, 336 U. S. 271, 275.”

See also *Lew Wah Fook v. Brownell*, 218 F. 2d, 924, and *Carr v. Yokohama Specie Bank, Ltd.*, 211 F. 2d, 251.

UNITED STATES VS. WALTER KORPAN

Appellants have cited in their brief the case of *United States v. Walter Korpan*, rendered in the United States Court of Appeals for the 7th Circuit, on September 28, 1956, No. 11669. We submit to the Court that this case is not pertinent because it involves a different kind of machine, the machine in question being a machine more closely resembling a pinball machine, the construction of §4462 of the Internal Revenue Code in the application of the terminology “so-called ‘slot’ machine” to the machines there in question. The Court did not have before it the application of Title 15, U. S. C. A. §1171, et seq., and whatever was said with reference to it was dicta.

CONCLUSION

We submit to this Court that the Findings of Fact of the District Court are not "clearly erroneous" and that the Electronic machines here involved are gambling devices which were in fact used as such, and that the clever change in the design of the machine which was an obvious attempt to evade the law does not take the machines out of the definitions contained in Title 15 U. S. C. A. §1171, et seq. These machines are suited only for use as gambling devices, and the decision of the District Court should be affirmed.

Respectfully submitted,

KREST CYR,
United States Attorney,
Federal Building,
Butte, Montana;

DALE F. GALLES,
Assistant U. S. Attorney,
Federal Building,
Butte, Montana;

MICHAEL J. O'CONNELL,
Assistant U. S. Attorney,
Federal Building,
Butte, Montana;

FRANK M. KERR,
Assistant U. S. Attorney,
Federal Building,
Butte, Montana,

Attorneys for Appellee,
UNITED STATES
OF AMERICA.

No. 15,200

IN THE

United States Court of Appeals
For the Ninth Circuit

CHARLES TUENGEL,

Appellant,

VS.

THE CITY OF SITKA, ALASKA, an incorporated Alaska municipality, BOARD OF NATIONAL MISSIONS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, a corporation, and SITKA COMMUNITY HOSPITAL,

Appellees.

Upon Appeal from the District Court
for the Territory of Alaska,
First Division.

APPELLEES' BRIEF.

FAULKNER, BANFIELD & BOOCHEVER,

P. O. Box 1121, Juneau, Alaska,

Attorneys for Appellees.

F I L

OCT

PAUL P. O'BRIEN



Subject Index

	Page
Statement of the case	1
Argument	3
Introduction	3

I.

The court adequately instructed the jury pertaining to proof of contributory negligence	4
---	---

II.

There was no error in the trial Court's Instruction No. 7 whereby the jury was instructed pertaining to ascertainment of damages in the event of a finding for the appellant	6
--	---

III.

In view of the sign on the basement door and the circumstances involved in this case, the question of negligence in regard to the construction and maintenance of the door was a question for the jury	7
--	---

IV.

There was no failure on the part of nurse Srein to use due diligence in directing appellant to the room of patient Cresa, and appellant failed to request an instruction to the effect that her directions constituted negligence. Appellant further failed to object to the instructions given pertaining to this issue	12
--	----

V.

The Court properly instructed the jury as to the duty of the appellee Board of National Missions of the Presbyterian Church toward the appellant	13
--	----

VI.

The Court properly permitted cross-examination of the appellant regarding his letter to a Mr. Davidson; and appellant failed to object to that cross-examination	16
--	----

VII.	
	Page
A conviction of criminal contempt of court may be shown to impeach the credibility of a witness	20

VIII.	
No witness was unreasonably, severely or repeatedly cross-examined	28

IX.	
The Court did not abuse its discretion in allowing appellees to cross-examine appellant by showing him a page from a book and asking him if he could read it without his glasses, and counsel for appellant made no timely objection	29

X.	
The Court did not err in propounding to the appellant questions which had been asked by a juror	33

XI.	
The Court did not emphasize one view of the case by undue repetition in its instructions	34

XII.	
The verdict was not contrary to the weight of evidence and there is no indication that the jury ignored material evidence because they found appellant had testified falsely as to immaterial facts	35
Conclusion	38

Table of Authorities Cited

Cases	Pages
American Sugar Refining Co. v. Nassif, 45 F.2d 321	31
Armstrong v. U. S., 18 F.2d 371	25
Baseball Pub. Co. v. Bruton, 18 N.E.2d 662	14
Bessette v. Conkey Co., 194 U.S. 324	25
Blackmer v. U. S., 284 U.S. 421	25
Buffalo Ins. Co. of City of Buffalo, N.Y. v. Bommarito, 42 F.2d 53	8
Carpenter v. Connecticut General Life Ins. Co., 68 F.2d 69	30
Charlton v. Kelly, 156 F. 433	18
Chicago Hansom Cab Co. v. Havelick, 131 Ill. 179, 22 N.E. 797	34
C. M. and St. P. Ry. Co. v. Artery, 137 U.S. 507	17
Chicago, M. & St. P. Ry. Co v. Harrellson, 14 F.2d 893	18
Clark v. Cleveland Drug Co., Inc., 204 N.C. 628, 169 S.E. 217	11
Coffee v. Sutton, 175 Ill. App. 331	33
Colby v. Reams, 63 S.E. 1009, 109 Va. 308	19
Collins v. Spragues Benson Pharmacy, 124 Nev. 210, 245 N.W. 602	11
Culver v. S. H. R. Co., 101 N.W. 663, 149 Minn. 141	19
Davis v. Schmitt Bros., Inc., 192 N.Y.S. 15, 199 App. Div. 683	15
Dayton Rubber Mfg. Co. of Delaware v. Sabra, 63 F.2d 865	36
DeLucia v. Polio, 140 A. 733, 107 Conn. 437	19
Equitable Life Assur. Soc. of U. S. v. MacDonald, 96 F. 2d 437, cert. den. 59 S.Ct. 86, 305 U.S. 624	36
Ex parte Grossman, 267 U.S. 87	26, 27
Fidelity and Casualty Co. of New York v. Griner, 44 F.2d 706 (9th Cir.)	2
Foren v. Rodick, 38 A. 175 (Me.)	9
Gompers v. U. S., 233 U.S. 604	26

	Page
Hill v. Douglass (Ninth Cir.), 78 F.2d 851	30
In Re Ashland, 4 Alaska 486 (Third Div., 1912)	25
Johnson v. Charles William Palumbo Co., 157 A. 902 (Conn.)	17
Kennedy Lumber Co. v. Rickborn, 40 F.2d 228	31
King v. New Masonic Temple Association, 125 P.2d 559....	10
Knapp v. Connecticut Theatrical Corp., 122 Conn. 413, 190 A. 291	11
Lazelle v. Norfolk & W. Ry. Co., 73 F. 2d 459	30
Martin v. Washington Times Co., 89 F. 2d 230	8
Maris v. H. Crummey, Inc., 204 P. 259, 55 Cal. App. 573 ..	33
Moore v. Ray, 22 P.2d 45	18
Morgenstern v. Sheer, 125 A. 790 (Md.)	10
Myers v. U. S., 264 U.S. 95	25
Napier v. First Congregational Church of Portland, 70 P. 2d 43 (Ore.)	11
New York Central Ry. Co. v. Dunbar, 296 F. 57	18
Niemeyer v. McCarty, 51 N.E. 2d 365	27
Ray v. Collins (Mo. App.), 247 S.W. 1098	33
Rich v. Consumer's Petroleum Co., 53 N.E. 2d 286 (S.C.) ..	19
Rosborough v. Chelan County, Wash., 53 F. 2d 198	36
Sacramento Suburban Fruit Lands Co. v. Elm, 29 F. 2d 233	36
Shows v. Brunson, 159 So. 248 (Ala.)	32
Southern Pac. Co. v. Johnson, 8 F. 2d 993	36
State v. Main, 216 P. 731, 37 Ida. 449	19
State v. Newcomb, 119 S.W. 405, 220 Mo. 54	19
Steil v. Holland, 3 F. 2d 776	36
Swift & Co. v. Daly, 44 F. 2d 40	36
Thalhimer Bros. Inc. v. Casci, 160 Va. 439, 168 S.E. 433..	11
Tipps v. United States, 70 F. 2d 525	14

TABLE OF AUTHORITIES CITED

v

Pages

U. S. v. Atkinson, 76 F. 2d, aff'd 56 S. Ct. 391, 297 U.S. 157	8
Wallace v. Keystone Auto Co., 239 Pa. 110, 86 A. 699	34
Western Nat. Ins. Co. v. LeClare, 163 F. 2d 337	20

Texts

A.C.L.A. 1949 :

Section 57-6-2	25
Section 58-4-61	21, 22, 23, 24
Section 65-2-1	24, 27

32 American Jurisprudence :

Page 27	29
Section 665	15

4 C.J.S. :

Section 246	30
Section 247 (see also 4 C.J.S., Sec. 290(b)aa, p. 570)	30
Section 290, pp. 572-575	22
Section 295	33
Section 299	36
Pages 606-608	8

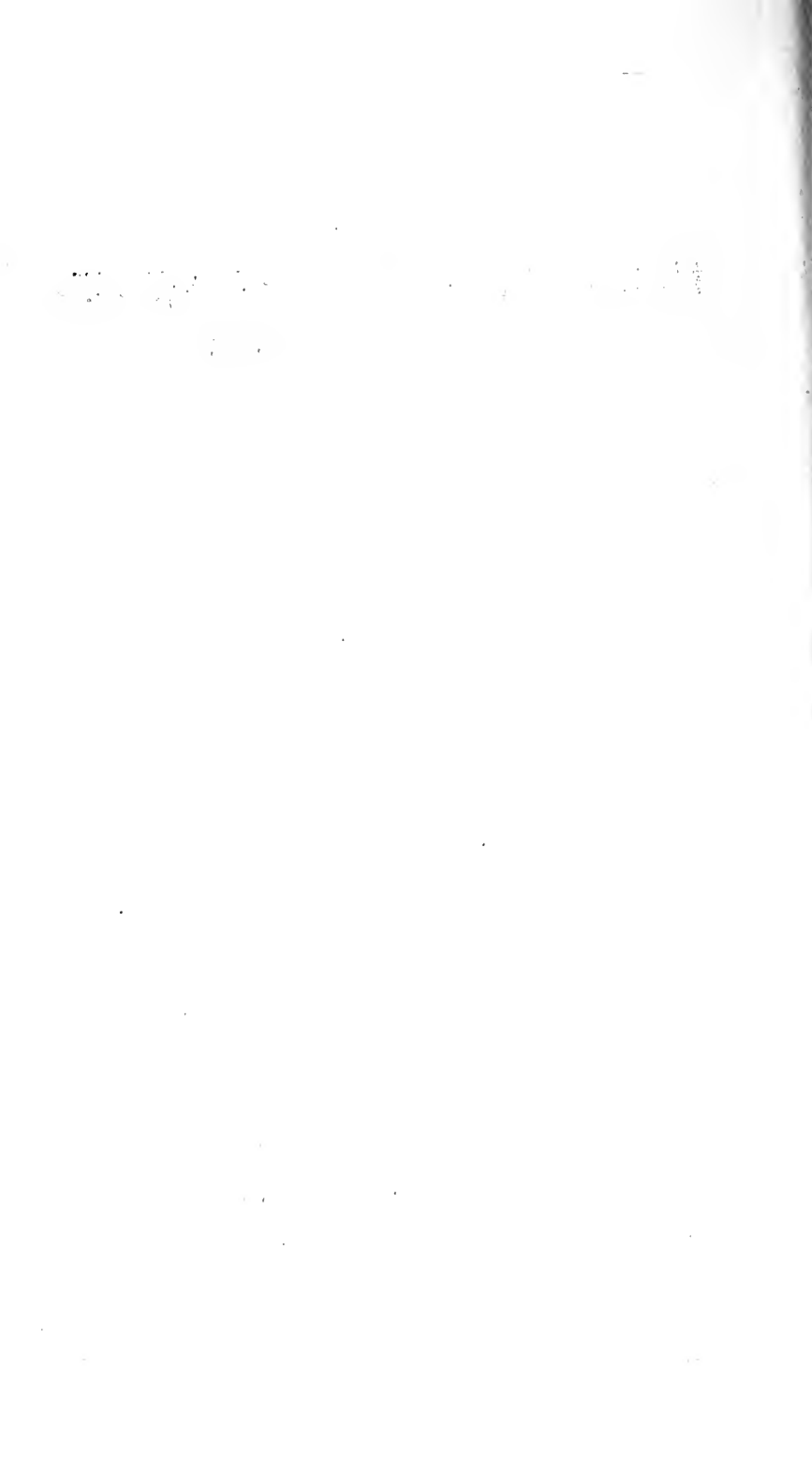
5 C.J.S., Section 1608, p. 508	28
--------------------------------------	----

88 C.J.S., Section 46	31
-----------------------------	----

52 C.J.S., Section 422, p. 76	15
-------------------------------------	----

Professor Wigmore on Evidence, Third Edition, Volume III,

Section 993	32
-------------------	----



No. 15,200

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHARLES TUENGEL,

Appellant,

VS.

THE CITY OF SITKA, ALASKA, an incorporated Alaska municipality, BOARD OF NATIONAL MISSIONS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, a corporation, and SITKA COMMUNITY HOSPITAL,

Appellees.

Upon Appeal from the District Court
for the Territory of Alaska,
First Division.

APPELLEES' BRIEF.

STATEMENT OF THE CASE.

Charles Tuengel, hereinafter referred to as appellant, brought suit in the United States District Court for the District of Alaska for damages alleged to have resulted from a fall down basement stairs at the Sitka Community Hospital in Sitka, Alaska. Sitka, a town

of 1,985 population according to the 1950 census, had secured the use of a building owned by the Board of National Missions of the Presbyterian Church of the United States of America for use as community hospital. (Tr. Vol. III, p. 291.) The hospital was operated by the City with the Board of National Missions having the right to use part of the building as an infirmary for students of the Sheldon Jackson School also operated by the Board. The City of Sitka and the Board of National Missions were named as defendants in the suit and the case was tried before a jury which rendered a verdict in favor of the defendants, the appellees herein. After due consideration of a Motion for New Trial, the learned trial judge entered judgment in favor of defendants in accordance with the verdict, from which judgment appellant has appealed. Appellant has made the jurisdictional statement required.

The facts on this appeal may be set forth as follows in view of the well accepted principle that, in considering a case on appeal, the testimony supporting the verdict will be considered if substantial, and evidence to the contrary will be rejected. *Fidelity and Casualty Co. of New York v. Griner*, 44 F.2d 706 (9th Cir.).

On or about the evening of November 17, 1951, appellant called at the Sitka Community Hospital at the request of a patient, Alex Cresa, for the purpose of cutting Mr. Cresa's hair. (Tr. Vol. II, p. 57.) A nurse, Mrs. Srein, an employee of the City of Sitka (Tr. Vol. III, p. 306), was on duty and directed him

to Mr. Cresa's room, informing appellant that it was the third room to the left, which directions were repeated by appellant. (Tr. Vol. III, p. 306.) Instead of going to that room and knocking for admission, appellant went to the fifth door on the left and looked in. This was a bathroom. (Tr. Vol. II, p. 18.) He then proceeded to open the next door, being the fourth door on the left, without first knocking, (Tr. Vol. II, p. 19), and fell down the basement stairs. The door to the basement was marked with a large white sign with large black letters stating "BASEMENT". This sign was well illuminated. (Tr. Vol. III, pp. 304, 309, 323, 324, 325, 331, 342.) The doorway opened towards the stairway, which led to an exit from the building, and the stairway was lighted at the time of appellant's fall. (Tr. Vol. III, pp. 307, 311.)

Appellant was not wearing his glasses, which were in his pocket, and without them could see nothing close in front of him. (Tr. Vol. III, p. 396.)

On hearing appellant fall, Mrs. Srein immediately came to his assistance. Appellant was not unconscious but did have a skinned elbow. He refused to see a doctor as requested by the nurse (Tr. Vol. III, p. 308), and left the hospital by himself. He proceeded to drive his car home.

ARGUMENT.

INTRODUCTION.

Counsel for appellant has set forth his argument under twelve different headings. For the purpose of

orderliness, this brief will take up appellant's points in the order raised.

I.

THE COURT ADEQUATELY INSTRUCTED THE JURY PERTAINING TO PROOF OF CONTRIBUTORY NEGLIGENCE.

Counsel for appellant attempts to take certain parts of the court's instructions out of context in an effort to contend that proper instructions were not given pertaining to the recognized fact that the burden of proving contributory negligence is on the one who pleads it, in this case the appellees.

It is well established that instructions must be regarded as a whole, and the court adequately covered the question of contributory negligence and the burden of proving the same. (Tr. Vol. I, p. 113.) Thus in Instruction No. 8 the court stated:

“In a civil case, such as this is, the burden of proof rests upon the party holding the affirmative with respect to any issue, to prove such issue by a preponderance of the evidence.” (Tr. Vol. I, p. 113.)

The instruction goes on to explain in further detail what is meant by the burden of proof. Instruction No. 3 specifies, in the last paragraph thereof:

“If the plaintiff has proven, by a preponderance of the evidence, any of such charges of negligence against the defendant City of Sitka, and the charge with respect to improper construction against the defendant Board of National Missions, and if your answers to the other questions

are in the affirmative, you should find for the plaintiff and against the party or parties whom you may find responsible; *provided, however*, that if the defendant has proven *by a preponderance of evidence* that the plaintiff was negligent and that such negligence proximately contributed to the injuries sustained by plaintiff, then he cannot recover.” (Emphasis ours.) (Tr. Vol. I, p. 103.)

The court further stated, in Instruction No. 6:

“It is for you to say whether such contributory negligence, if any, has been established, and the burden of establishing such a defense by a preponderance of the evidence is on the defendant.” (Tr. Vol. I, p. 107.)

It is difficult to understand how the court could have more clearly stated the burden of proof pertaining to contributory negligence.

It is true that counsel may be able to pick out a sentence from the instructions at random which would give an erroneous impression. The instructions must be considered as a whole, however, and in fact the court so instructed the jury in Instruction No. 13 (Tr. Vol. I, p. 120.) It is respectfully submitted that no error was committed by the court in instructing on this issue.

II.

THERE WAS NO ERROR IN THE TRIAL COURT'S INSTRUCTION No. 7 WHEREBY THE JURY WAS INSTRUCTED PERTAINING TO ASCERTAINMENT OF DAMAGES IN THE EVENT OF A FINDING FOR THE APPELLANT.

Counsel in his brief refers to Instructions No. 6 and 7, but apparently his argument on this point deals only with Instruction No. 7 wherein the court stated:

“However, it must be shown, before damages may be allowed for any such aggravated injury or condition, that such was the proximate result of the negligence complained of, and not the result of any inattention to such injuries or failure to observe the reasonable advice or instructions of competent physicians on the part of the plaintiff; and that any such aggravated condition which may have been caused by the fault of the plaintiff may not be considered as an element of damage.” (Tr. Vol. I, p. 110.)

Counsel contends that this issue has not been raised by the pleadings and the proof. This ignores the fact that the complaint alleged elements of damage which were denied in the answer. Therefore, any question pertaining to damages was raised by the pleadings. Furthermore, proof was submitted touching on this exact subject. Thus appellant stated:

“Q. And when did Doctor Degge tell you that from now on you should just exercise your arm?

A. After he took my arm out of the cast, that is when he told me that——

Q. What date was that? Do you remember what month?

A. I don't remember. It has been so far back.

Q. Actually, wasn't that in April of 1952?

A. I don't remember.

Q. And have you been exercising your arm?

A. I have tried it numerous times.

Q. But you haven't been doing it?

A. No, sir. I pay for it when I do." (Tr. Vol. II, p. 63.)

See also Tr. Vol. II, p. 44. In addition, see Tr. Vol. II, p. 247 and Tr. Vol. III, p. 387, wherein Doctors Moore and Shuler explained the desirability of exercise in appellant's case. Furthermore, any objection pertaining to damages would appear to be completely irrelevant on this appeal since the jury has found that the appellant was entitled to no damages. Had the jury returned a verdict for a small sum of money, appellant might be in a position to raise an objection such as this, but questions pertaining to damages are not material on an appeal from a jury verdict in favor of the defendants.

III.

IN VIEW OF THE SIGN ON THE BASEMENT DOOR AND THE CIRCUMSTANCES INVOLVED IN THIS CASE, THE QUESTION OF NEGLIGENCE IN REGARD TO THE CONSTRUCTION AND MAINTENANCE OF THE DOOR WAS A QUESTION FOR THE JURY.

In view of the sign on the basement door and the circumstances involved in this case, the question of negligence in regard to the construction and maintenance of the door was a question for the jury, and

furthermore, counsel failed to request an instruction to the contrary. Counsel contends that the construction and maintenance of the cellar door of the hospital constituted negligence in itself, regardless of the fact that a sign was placed on the door and that the door was not for use by the public generally. At the outset it is to be noted that counsel presented no requested instruction to the effect that the construction and maintenance of the cellar door and stairway was negligence in itself. Having failed to make a timely request for an instruction on this subject, and having failed to make any objection to the court's instruction on this subject, counsel is precluded from raising Questions No. 3, 4 and 5 on this appeal.

“Generally, unless the error is fundamental, or the manner of submitting the case may have caused a miscarriage of justice, an objection to the submission of an issue or question of fact, the form of submission, or irregularities therein, when first made on appeal, comes too late. Likewise, it cannot be objected for the first time on appeal that the court erroneously submitted a question of law to the jury, or a mixed question of law and fact as a question of fact, or that the issues raised by pleas to the jurisdiction and to the merits were submitted at the same time.”

4 C.J.S., pp. 606-608.

U. S. v. Atkinson, 76 F.2d aff'd 56 S.Ct. 391, 297 U.S. 157;

Buffalo Ins. Co. of City of Buffalo, N.Y. v. Bommarito, 42 F.2d 53;

Martin v. Washington Times Co., 89 F.2d 230.

Regardless of the fact that the issue as to whether the court erred in leaving to the jury the question of negligence pertaining to the construction and maintenance of the door or the steps is not properly before this honorable court, in view of the fact that counsel presented no request for instruction to that effect or any objection to the instruction of the court concerning this subject, it is felt that the objections are entirely without merit and unsupported by the cases cited by appellant.

The case of *Senner v. Danewolf*, cited by appellant as 9 P.2d 240, apparently involves an erroneous citation since no such case could be found in that volume. Moreover, the facts of the case, as stated by attorney for the appellant, are readily distinguishable in that there was no question of the plaintiff in the *Senner* case failing to follow directions and there was no adequate sign properly illuminated indicating the presence of the stairway. These facts must be regarded as established in the subject case, as, on appeal, facts will be regarded as most favorable to the party prevailing under a jury verdict.

In the case of *Foren v. Rodick*, 38 A. 175 (Me.), the facts are in sharp contrast with the subject case in that a physician's office was located on the second floor of a building and the only sign present indicated that his office was in the building. This sign was located between two similar doors, one of which, without any warning sign whatsoever, opened over a stairway. The court pointed out that there was nothing to inform the plaintiff as to which door to take. In

the subject case the jury must be regarded as having found that there were proper instructions given to the appellant as to which door to take and there was also the well illuminated sign on the door.

The case of *King v. New Masonic Temple Association*, 125 P.2d 559, (erroneously cited in appellant's brief as 599), is not in point since there was no question of proper directions having been given or a sign indicating the depression in the floor which caused plaintiff's injury. Moreover, the case was decided on a motion for nonsuit by the defendant and the reviewing court accordingly looked at the facts in the most favorable light to the plaintiff with the result that it was decided to remand the case so that it could be tried by a jury.

In the only other case cited by appellant, being that of *Morgenstern v. Sheer*, 125 A. 790 (Md.), there was disputed testimony as to whether there was a sign on the door stating "Positively No Admittance". The jury found for the plaintiff and the court on appeal stated:

"... the plaintiff offered evidence tending to show that there were so such warning signs at the time of the accident, and it was for the jury to determine the issue of fact thus raised."

Had the learned trial court decided the case for the defendants without submitting the issues to the jury, appellant's authorities might carry some weight.

Actually, there are a number of authorities holding that, under circumstances similar to those in the sub-

ject case, as a matter of law there is either no negligence on the part of the defendant or contributory negligence on the part of the plaintiff. Thus in the case of *Knapp v. Connecticut Theatrical Corp.*, 122 Conn. 413, 190 A. 291, it was held that a theatre owner was not liable to a theatre patron who, in searching for the men's toilet, mistakenly opened a door leading to the basement of the building and fell over a waste-paper container on the unlighted stairway. The door had no sign on it. A similar holding was made in the case of *Thalhimer Bros. Inc. v. Casci*, 160 Va. 439, 168 S.E. 433. In *Clark v. Cleveland Drug Co., Inc.*, 204 N.C. 628, 169 S.E. 217, a customer in a store asked to use a phone and was led to the phone in the rear of the store. After using the phone, the customer opened a door attempting to return to the front of the store, and fell down a dark basement stairway. A judgment of dismissal was affirmed, the court holding:

“It was perfectly obvious that plaintiff's unfortunate injury resulted directly from her want of judgment or her want of care.”

See:

Collins v. Spragues Benson Pharmacy, 124 Nev. 210, 245 N.W. 602, and

Napier v. First Congregational Church of Portland, 70 P.2d 43 (Ore.).

In any event, it is clear that, at best, the issues raised by these objections of the appellant were matters to be decided by the jury and the court properly instructed the jury in that regard.

IV.

THERE WAS NO FAILURE ON THE PART OF NURSE SREIN TO USE DUE DILIGENCE IN DIRECTING APPELLANT TO THE ROOM OF PATIENT CRESA, AND APPELLANT FAILED TO REQUEST AN INSTRUCTION TO THE EFFECT THAT HER DIRECTIONS CONSTITUTED NEGLIGENCE. APPELLANT FURTHER FAILED TO OBJECT TO THE INSTRUCTIONS GIVEN PERTAINING TO THIS ISSUE.

Counsel contends that it was error for the court to leave to the jury the question of whether Nurse Srein was negligent in directing appellant to the room of the patient Cresa. The nurse instructed appellant that he was to go to the third room on the left, which directions were repeated by appellant. (Tr. Vol. III, p. 306.) The court left it to the jury to determine whether "the nurse did give inadequate or improper instructions to the plaintiff . . . and that such act was in effect negligence . . ." (Instruction No. 5, Tr. Vol. I, p. 105.)

Counsel for appellant made no objection to this instruction, nor did he request the court to instruct, as a matter of law, that Nurse Srein was negligent in the manner in which she gave instructions. Counsel now contends that it was the duty of Nurse Srein to direct appellant to the room of the patient Cresa by personally escorting him to that room. It would appear self-evident that, at most, this would be a jury question. No evidence was presented as to any custom in hospitals whereby nurses are required personally to take visitors to the rooms of patients.

As explained *supra* in the discussion of point III, an issue pertaining to the submission of issues to the

jury cannot be complained of for the first time in the appellate court.

Counsel cites cases involving concealed peril to invitees. No such issue is presented in the subject case since, if appellant had followed the instructions which were given to him, he would never have reached the basement door, assuming that such door with its well illuminated sign could possibly be regarded as a concealed peril.

Accordingly, it is respectfully submitted that no error was committed by the court in leaving the issue to the jury pertaining to the directions given by the Nurse Srein.

V.

THE COURT PROPERLY INSTRUCTED THE JURY AS TO THE DUTY OF THE APPELLEE BOARD OF NATIONAL MISSIONS OF THE PRESBYTERIAN CHURCH TOWARD THE APPELLANT.

Counsel contends that it was error for the court to instruct the jury, in Instructions No. 5, 6 and 7, that appellee Board of National Missions would be liable for negligence for improper construction of the cellar door upon the premises, but not for any possible negligence of the Nurse Srein in giving directions. The undisputed testimony was that Nurse Srein was an employee of the City of Sitka and not an employee of the appellee Board. (See Tr. Vol. III, p. 306.)

Furthermore, it is difficult to see how any error which might possibly have been made in instructions

pertaining to the liability of the Board of National Missions would be material on this appeal in view of the fact that the jury found in favor of both appellees. The most that the appellant could have desired would be an instruction to the effect that the Board would be liable under the same facts and circumstances as the appellee City of Sitka. Since the jury found that the appellee City of Sitka was not liable, any error pertaining to instructions as to the Board's liability is clearly immaterial.

The case of *Tipps v. United States*, 70 F.2d 525, pertaining to the payments required by one who held over under a lease is hardly in point. The case of *Willett v. Pilotte*, cited by appellant at 190 N.E.2d 840, is evidently an erroneous citation as there is no such volume and the case does not appear in 19 N.E.2d. In any event, the facts as stated by counsel are readily distinguishable in that there was no question of the seller of Christmas trees giving erroneous instructions or in regard to maintaining a proper sign properly illuminated. The case of *Baseball Pub. Co. v. Bruton*, 18 N.E.2d 662, pertaining to the distinction between a lease and a license, would appear to have no bearing on the subject case since it was clear that the appellee City of Sitka had the exclusive control of the portion of the premises involved in this accident at the time of the accident.

The arrangement by which the City of Sitka occupied the ground floor of the hospital was testified to by the witness Leslie Yaw as follows:

"A. At that time the City of Sitka was without hospital facilities. I happened also to be a member of the hospital committee of Sitka, and this committee was charged with the responsibility of making some arrangements whereby mothers and emergency cases could be taken into a hospital, so it was in my mind at the time and represented to our Board from whom consent was given that we do this as a community service to help meet a community need.

* * * * *

Q. Mr. Yaw, who—what was the nature of the arrangement? Who was in charge of the ground floor of the hospital?

A. After our agreement, the City of Sitka."

Certainly an organization which charitably permits a city to use its property for the conduct of a badly needed hospital, regardless of whether the arrangement by which the use of the property is permitted is called a lease or otherwise, should be held to no greater liability than that of a landlord. That liability extends only to injuries resulting from defective construction of a building and "liability of the landlord does not arise unless he has reason to expect that the tenant will not take steps to remedy or guard against injury from the defect." (52 C.J.S., Sec. 422, p. 76; 32 Am. Jur., Sec. 665.) In fact, it has been held that one who permits his property to be used by the public, without compensation, is not liable for injuries to invitees even when due to latent defects in the premises. See *Davis v. Schmitt Bros., Inc.*, 192 N.Y.S. 15, 199 App. Div. 683.

Accordingly, it is respectfully submitted that the issue raised by this question of appellant's is immaterial on this appeal and, furthermore, that the court properly instructed the jury as to the liability of the Board of National Missions.

VI.

THE COURT PROPERLY PERMITTED CROSS-EXAMINATION OF THE APPELLANT REGARDING HIS LETTER TO A MR. DAVIDSON; AND APPELLANT FAILED TO OBJECT TO THAT CROSS-EXAMINATION.

On cross-examination, appellant was shown a letter which he admitted he had written and testified concerning a statement made in that letter regarding the presence of a sign on the basement door. The letter involved was exhibit to the appellant and was also furnished his counsel. At the time of the questioning of appellant, counsel for appellant interposed an objection but then withdrew the objection, stating "Oh, let him answer it—I don't care." (Tr. Vol. II, p. 68.) Counsel made no request to have the entire letter introduced into evidence.

Having failed to object to the cross-examination of the appellant at the time that cross-examination was conducted, and in fact having consented to the asking of the questions, counsel is not in a position to object to the cross-examination on appeal. Counsel further states that appellees should have been required to put the entire letter into evidence, yet no objection to that effect was raised by counsel. Counsel further

states that he was not permitted to identify adequately the letter by showing the entire contents and address thereon. It is respectfully submitted that counsel for appellant never endeavored to introduce the entire letter into evidence.

It is further submitted, however, that, in the absence of an offer of proof to show any relevancy with reference to the additional portions of the letter other than that previously testified to by the appellant, counsel would not have had the right to submit the remaining portions of the letter into evidence. Appellees readily admit that appellant was entitled to present any other portions of the letter which would tend to explain the admission pertaining to the sign on the door which was brought out in cross-examination. Learned counsel for the appellant, however, made no offer of proof in that regard. The authorities cited by appellant do not support his contention with reference to the introduction into evidence of the entire letter.

In the case of *Johnson v. Charles William Palumbo Co.*, 157 A. 902, (Conn.), a blueprint which was not in evidence and which was not shown to have been made by the plaintiff was held not to be a proper subject for questions on cross-examination. It is submitted that a different ruling would be involved had the plaintiff made a prior written statement contradicting in part his oral testimony.

The Supreme Court case of *C. M. and St. P. Ry. Co. v. Artery*, 137 U.S. 507, 520, appears to support the

appellees' position in this regard rather than appellant's contentions. The court stated therein:

"We think the Circuit Court erred in laying it down as a rule that a written statement signed by a witness and admitted by him to have been so signed, cannot be used in cross examining him as to material points testified to by him . . ."

Similarly, in *Chicago, M. & St. P. Ry. Co. v. Harrellson*, 14 F.2d 893 at 897, it was held that only the parts of a deposition bearing on the particular transaction concerning which impeachment was sought should have been read to the jury. To the same effect is *Charlton v. Kelly*, 156 F. 433, decided by this honorable court, wherein it was stated:

"For the purpose of impeachment a deposition is to be regarded as any other statement or declaration of the witness, and it is not necessary that the whole of the deposition be read or any greater portion thereof than that which directly relates to the proposed impeachment."

In *New York Central Ry. Co. v. Dunbar*, 296 F. 57 at 60, it was held that the only proper method of securing testimony pertaining to a previous statement was to limit the testimony to the portions of the statement involving contradictions and that it was proper to exclude the remaining portions of the statement.

The case of *Moore v. Ray*, 22 P.2d 45, is directly in point in that portions of a written statement were used in cross-examination of the appellant and the court refused appellant's motion to admit the whole statement in evidence. The court held:

“The witness was then interrogated as to one paragraph dealing with the speed of the approaching car and its position on the highway and the condition of its lights. Respondent did not offer the statement in evidence but, on redirect examination, appellants offered the entire statement. To this an objection was sustained. This was proper for only that portion dealing with the same subject matter touched upon in the examination may be inquired into upon redirect examination, and there was here no showing that the proffered portions of the statement referred to the same subject.”

See also *State v. Main*, 216 P. 731, 37 Ida. 449; *State v. Newcomb*, 119 S.W. 405, 220 Mo. 54; *DeLucia v. Polio*, 140 A. 733, 107 Conn. 437; *Culver v. S.H.R. Co.*, 101 N.W. 663, 149 Minn. 141; *Colby v. Reams*, 63 S.E. 1009, 109 Va. 308. In the case of *Rich v. Consumer's Petroleum Co.*, 53 N.E.2d 286 (S.C.), it was held to be error for the court to admit into evidence other isolated portions of a statement not related to cross-examination questions.

The points raised by counsel on this question on appeal are not properly before this court due to counsel's failure to object to the questions on cross-examination and his further failure to request the court to permit introduction of the entire letter. Had such request been made, however, the court would certainly have been justified in denying the same as to all portions of the letter not relevant to the subject matter touched upon in the cross-examination pertaining to the letter.

VII.

A CONVICTION OF CRIMINAL CONTEMPT OF COURT MAY BE SHOWN TO IMPEACH THE CREDIBILITY OF A WITNESS.

Counsel contends that “the court erred in permitting appellees to read to the jury the inducement recital in appellees’ Exhibit A and thereby to prejudice the jury into bringing to the attention of the jury the more serious charge of tampering with the jury with which appellant was never convicted.” (Appellant’s brief, p. 68.) At the outset, it must be pointed out that Exhibit A merely constituted the record of conviction. It was not a transcript of the entire proceedings before the court in the contempt case. Counsel is in error in stating that the court permitted appellees to read to the jury the inducement recital. Although at one time request was made to the court to permit reading of Exhibit A, the transcript reveals that the exhibit was never read to the jury.

Counsel’s argument primarily does not deal with the question presented, being question 11 and quoted on page 68 of appellant’s brief, as set forth above. Counsel’s argument concerns the question of whether, under Alaska law, a witness may be impeached by the record of a judgment for conviction of a criminal contempt. Since this question is not set forth in appellant’s statement of points to be considered on this appeal, it may not be raised in appellant’s brief, and it is respectfully submitted should not be considered on this appeal. In the case of *Western Nat. Ins. Co. v. LeClare*, 163 F.2d 337, this honorable court stated: “Three points argued by appellant were that the evidence is neither clear nor convincing; that it

does not show Raymond's authority to enter into an oral contract for or on behalf of appellant; and that it does not show Mr. LeClare's authority to act for or on behalf of appellee. These points were not stated in appellant's statement of points and hence need not be considered by us."

The question which was set forth by counsel in his statement of points concerns the inducement recital in the judgment of conviction. This issue may not be raised on this appeal since no objection was taken to the introduction of the exhibit on that ground and, moreover, appellant's motion to strike the exhibit did not set forth that basis. When the exhibit was first offered in evidence, counsel for appellant objected as follows: "If the court please, I object to that as incompetent, irrelevant and highly prejudicial. You can't attack a man's character until he has offered his own good character in evidence. I submit you can't do that." (Tr. Vol. II, p. 69.) This constituted but a general objection made specific by the last two sentences of the objection and the specific grounds, as stated, do not apply in a civil case, particularly where, as in Alaska, statutory law specifically states that:

"It may be shown by the examination of the witness or the record of the judgment that he has been convicted of a crime."

Section 58-4-61, ACLA 1949.

The law pertaining to objections such as made by counsel is set forth as follows:

“A mere general objection such as one which only states that the party objects, that the evidence is incompetent, irrelevant, and immaterial, or that it is ‘clearly improper and inadmissible’, is ordinarily insufficient to present any question for review, except where the objection is such that the trial court cannot fail to understand the ground upon which it is based . . .

“When a specific objection has been made, the appellate court will consider no grounds or reasons other than those that have been specified or urged in the trial court; and, if an improper or wrong reason or ground is assigned in objecting to evidence, the appellate court will treat the evidence as if no objection had been taken.”

4 C.J.S., Sec. 290, pp. 572-575.

Furthermore, when the actual record was presented for introduction into evidence, counsel for appellant stated: “I don’t know whether it is true or not but we will admit it.” (Tr. Vol. II, p. 70.) Accordingly, the record of the conviction of criminal contempt was introduced into evidence without any objection by counsel calling the court’s attention to the grounds he now arises on appeal.

Subsequently, counsel filed “Plaintiff’s Motion to Strike Defendants’ Exhibit A and Evidence Relative Thereto”. This motion is based on the allegation that a criminal contempt does not constitute a crime under the provisions of Sec. 58-4-61, ACLA 1949. No mention is made, again, in the motion to strike of the inducement portion of the judgment of conviction of contempt. It is respectfully submitted that, having failed to raise the objection at the trial, counsel is

precluded from contending on appeal that the exhibit should not have been admitted for the reason that the inducement recital in the judgment set forth the fact that the appellant was originally accused of the charge of tampering with the jury.

Had appellant raised that issue, it is quite possible that the court might have stricken from the judgment record the recital portion thereof, although it is respectfully submitted that in no event was it error to admit the record of conviction, which is the specific means stated in Sec. 58-4-61, ACLA 1949, of proving a conviction. That statute states “. . . except that it may be shown by the examination of the witness *or the record of the judgment* that he has been convicted of a crime.” (Emphasis ours.) See also *Meeks v. United States*, decided by this honorable court, 163 F.2d 598.

Moreover, the recital information contained in the judgment could not constitute prejudicial error since it specifically showed that the appellant was not guilty of the crime of attempting to influence a juror but that he was guilty of contempt of court for directly violating the order of the court.

Although the question is not presented on appeal, counsel in his brief argues that a witness may not be impeached by proof of conviction of a criminal contempt. As indicated above, this objection was not made at the time of the introduction into evidence of Exhibit A, the record of the conviction. The question was presented by appellant's subsequent motion to strike, but it has not been set forth as a ground

for appeal in appellant's statement of points. Since counsel has discussed this matter at length in his brief, appellees will comment on this issue, although it is respectfully submitted that it is not properly presented for consideration on this appeal.

Defendants agree with plaintiff that proceedings for the punishment of contempts of court are *sui generis* in the sense that the ordinary procedural requirements of the Sixth Amendment and the due process clause do not apply to such proceedings. However, it is only the procedure and not the substance of the offense which is *sui generis*. In the Territory of Alaska a criminal contempt is a crime by virtue of the express statutory terms governing contempts and crimes. This conclusion is further buttressed by the authoritative language of certain U. S. Supreme Court decisions.

Section 58-4-61, ACLA 1949, states that "... it may be shown by the examination of the witness or the record of the judgment that he has been convicted of a crime." The question then is what constitutes a "crime" within the meaning of the impeachment statute. Section 65-2-1, ACLA 1949, states that "a crime or public offense is an act or omission forbidden by law, and punishable, upon conviction, by either of the following punishments:

First—Death;

Second—Imprisonment;

Third—Fine;

Fourth—Removal from office;

Fifth—Disqualification to hold or enjoy any office of honor, trust or profit."

From this it would certainly appear that a contempt which is punished in order to vindicate the power and authority of the court is a crime because Section 57-6-2 vests the court with the power to punish contempt by fine or imprisonment or both. This is the view which was taken by Judge Cushman in the case of *In Re Ashland*, 4 Alaska 486 (Third Div., 1912), at page 492, where it is stated:

“Contempts of court are punishable by fine, or imprisonment, or both. Section 610, Pt. 4, Carter’s Codes. A contempt of court, therefore, is a crime as defined in Section 2, Pt. 2, Carter’s Codes, *supra*.”

The sections of Carter’s Codes cited by the court are precisely the same ones as are now embodied in Alaska Compiled Laws Annotated 1949 and cited above. In the *Ashland* case, *supra*, the court refused to issue a liquor license to a person who had been convicted of a criminal contempt of court, this refusal being based upon his having violated the laws governing the sale of intoxicating liquors.

The case of *Blackmer v. U. S.*, 284 U.S. 421; *Myers v. U. S.*, 264 U.S. 95; *Bessette v. Conkey Co.*, 194 U.S. 324, and *Armstrong v. U. S.*, 18 F.2d 371, are cited by appellant in support of his position. However, an examination of those cases reveals that they were concerned with the procedure to be followed in certain contempt cases and not with the substantive nature of a contempt of court, and to that extent they are of no value as authority on the issue here under consideration. On the contrary, the language of those

and other Supreme Court cases is more helpful to the position of appellees. The whole thing was summed up very well by Chief Justice Taft in *Ex parte Grossman*, 267 U.S. 87 at page 116, where he quotes the language of *Gompers v. U. S.*, 233 U.S. 604, to the effect that criminal contempts are crimes just as much as though a trial by jury were had. It might be well at this point to quote the language of *Gompers v. U. S.*, *supra*, at page 610:

“It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury, etc., to persons charged with such crime. But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. (Citations). It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. *If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.* (Emphasis supplied). So truly are they crimes that it seems to be proved that in the early law

they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N.S. p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way. (Citations)."

In *Ex parte Grossman, supra*, the Supreme Court determined that a criminal contempt was an offense pardonable by the President. It might be said that the word "offense", as contained in the United States Constitution, is a broader one than the word "crime", but if we refer back to Sec. 65-2-1, ACLA 1949, we find that it speaks of "a crime or public offense", so that the two terms are virtually equated.

Niemeyer v. McCarty, 51 N.E.2d 365, and the other state court decisions cited by appellant are of little value in determining the nature of a criminal contempt in the Territory of Alaska. For example, in *Niemeyer v. McCarty, supra*, it was held that a contempt conviction cannot be used for impeachment, but that was under a statute which allowed impeachment only by showing a conviction of an infamous crime and contempt was not statutorily so classified.

The theory of the rule allowing impeachment by proof of commission of a specific crime is that there is a reasonable connection between criminality and mendacity. It would certainly seem that one who has been convicted of contempt of court for attempting to influence a juror has shown the requisite culpability to allow him to be impeached therefor. The ruling of the court on this matter was entirely in accordance with the explicit language of the Alaska statutes, the

nature of criminal contempt as revealed by U. S. Supreme Court decisions and decisions of the Alaska courts, and the policy of the Alaska statute on impeachment of witnesses.

It is contended in the brief of appellant that only the record of the judgment of conviction should have been put into evidence in the case, and not the entire record of the contempt proceedings. So far as appellees know, it was only the record of judgment which was read to the jury and entered as an exhibit.

Appellant failed to raise any objection during the trial to the introduction of Exhibit A on the grounds set forth in his statement of points relied upon on appeal, paragraph 11, and, furthermore, it is respectfully submitted that, in any event, it was not error of the learned trial judge to permit the introduction of the record of conviction under the express provisions of Alaska statutory law.

VIII.

NO WITNESS WAS UNREASONABLY, SEVERELY OR REPEATEDLY CROSS-EXAMINED.

Counsel contends that the witness Cresa was cross-examined unduly severely and repetitiously.

“Unless there has been a clear prejudicial abuse, the appellate court will not seek to review or control the exercise of the trial court’s discretion with reference to the . . . cross examination . . . of witnesses . . .”

5 *C.J.S.*, Sec. 1608, p. 508.

The trial court did not feel that the witness Cresa, a highly evasive witness, was cross-examined unduly severely. The record of the cross-examination of the witness Cresa appears on pages 136 to 147, Tr. Vol. II. Much of that portion of the record is taken up with objections by counsel for appellant.

It is noted that, in learned counsel's brief, no specific instance is given as to where the cross-examination was unduly severe or repetitious. It is respectfully submitted that any reading of the record will reveal that the trial court did not abuse its discretion with reference to the cross-examination of that witness.

IX.

THE COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING APPELLEES TO CROSS-EXAMINE APPELLANT BY SHOWING HIM A PAGE FROM A BOOK AND ASKING HIM IF HE COULD READ IT WITHOUT HIS GLASSES, AND COUNSEL FOR APPELLANT MADE NO TIMELY OBJECTION.

Counsel now contends that it was improper to permit cross-examination of appellant by showing him 32 *Am. Jur.*, p. 27, and pointing to the word "INTRODUCTORY" which appears in large caps on that page, while holding the book two feet from appellant's face and requesting appellant to read the word. No objection was made at the time that this experiment was performed. (See Tr. Vol. III, pp. 394, 395.) It was only after the witness answered that he could not read the large print without his glasses that counsel raised an objection. The evidence had already been

introduced. Apparently counsel was willing to have the questions asked in the event that the answers would be favorable to his client but, after the answers were given, showing that appellant could not read the exhibit, counsel objected. Even then no objection was made for the reason now set forth in appellant's statement of points. The objection that was made was to the effect that it was an improper experiment without introducing the book into evidence. (Tr. Vol. III, p. 395.) "Mr. Robertson: Well, now, that is not—I object to that kind of testimony without introducing it into evidence, to show a book around here. I don't even know what book it is."

Since no proper objection was made to the experiment at the time of the introduction of the evidence, the question may not be presented to this learned court on appeal.

"To be available the objection must be a timely one. In order to be timely it must ordinarily be made during the trial and in time to allow the alleged error to be avoided or corrected."

4 *C.J.S.*, Sec. 246.

"Generally, to be sufficient to preserve a question of review, an objection must specifically point out the ground or grounds upon which the alleged error is predicated."

4 *C.J.S.*, Sec. 247. (See also 4 *C.J.S.*, Sec. 290(b)aa, p. 570.)

Lazelle v. Norfolk & W. Ry. Co., 73 F. 2d 459;
Hill v. Douglass (Ninth Cir.), 78 F.2d 851;
Carpenter v. Connecticut General Life Ins. Co.,
 68 F.2d 69;

American Sugar Refining Co. v. Nassif, 45 F.2d 321;

Kennedy Lumber Co. v. Rickborn, 40 F.2d 228.

Although appellees believe that this question is not properly presented, it is also respectfully submitted that the court did not abuse its discretion in allowing the appellees to cross-examine the appellant in the manner specified. In view of the fact that numerous reputable witnesses testified as to the presence of a well illuminated sign stating "Basement" upon the door leading to the basement stairway, and that the appellant denied there was such a sign at the time of his accident, the appellant's vision was a relevant fact to be considered by the jury. The testimony was undisputed that appellant was not wearing his glasses at the time of his injury, and appellant further testified that his eyesight was the same at the time that he appeared on the witness stand as it was on the night of the injury. (Tr. Vol. III, p. 394.)

It is well established that experiments and tests in cross-examination are within the discretion of the trial court. Thus it is stated at 88 *C.J.S.*, Section 46:

"It is ordinarily within the discretion of the court before which a trial is being conducted to permit or refuse to permit experiments as well as demonstrations to be conducted before the jury, or tests to be made by the jury . . . Accordingly, the trial judge may permit or refuse to permit experiments or demonstrations before the jury according to whether or not, in his opinion, the information which may be gained thereby is sufficiently relevant and material."

This principle is discussed by Professor Wigmore in his monumental works on Evidence, Third Edition, Volume III, Section 993, as follows:

“It is not doubtful that on *cross-examination*, so far as feasible by mere questions, the witness’ physical capacity to observe (by sight, hearing, or the like) may be tested. On the other hand, it is hardly less doubtful that *extrinsic testimony* to particular instances of his incapacity in those respects would not be permissible. But mere questions on cross-examination can seldom effect much; the useful thing is usually something of a mixed nature, *i.e. experiments made in court* to test the witness’ powers. These should be freely allowed, subject to the discretion of the trial Court.”

The cases cited by learned counsel for the appellant do not involve situations analogous to the subject case and the most that is held by the two cases discussed is that refusal of the court to permit an experiment under the circumstances involved in those cases was not error and the cases do not hold that it would be error to permit the experiments. In fact, in the case of *Shows v. Brunson*, 159 So. 248 (Ala.), incorrectly cited in appellant’s brief as 158 So. 248, the court expressly stated:

“If limited to the typewritten portions and to the ‘Bank of Lucerne’ in large letters, the evidence might have afforded some test as to whether he could see as well as he claimed, but not as to whether he did or did not have his glasses on at the time . . .

“Experiments or tests of this character are usually within the discretion of the trial judge

guided by a sound judgment as to whether the result will be sufficiently relevant and material to warrant such procedure.”

There certainly was no abuse of discretion on the part of the trial court in permitting the test to be made as pertains to the appellant's vision in the subject case.

X.

THE COURT DID NOT ERR IN PROPOUNDING TO THE APPELLANT QUESTIONS WHICH HAD BEEN ASKED BY A JUROR.

Counsel for appellant admits that it is permissible for jurors to ask questions of witnesses. See appellant's brief, page 91. Nevertheless, he now objects to the fact that questions were propounded to the witness Tuengel by a juror. No objection was made at the time that the questions were propounded. (See Tr. Vol. III, p. 390.)

“As a general rule, objections with reference to the examination or cross examination of witnesses, not raised in the court below, will not be considered in the appellate court. This rule precludes objection from first being made in the appellate court to . . . the questioning of witnesses by jurors . . .”

4 *C.J.S.*, Sec. 295.

See:

Maris v. H. Crummeys, Inc., 204 P. 259, 55 Cal. App. 573;

Ray v. Collins (Mo. App.), 247 S.W. 1098;

Coffee v. Sutton, 175 Ill. App. 331;

Wallace v. Keystone Auto Co., 239 Pa. 110, 86 A. 699;

Chicago Hansom Cab Co. v. Havelick, 131 Ill. 179, 22 N.E. 797.

Counsel objects to the fact that the identity of the juror propounding the question was not disclosed. At the trial he did not request that the identity of the juror be disclosed. Counsel also contends that the witness should be given an opportunity to express himself fully. The court never denied counsel any request to further examine witness on the subject of the juror's questioning. If counsel had doubt, as he states in his brief, that the witness had answered the question satisfactorily to the juror, he could have inquired of the panel as to whether any further questions pertaining to the matter were necessary in order fully to satisfy the jury's mind on the questions involved.

It would appear that this question raised on appeal, without any objection in the trial court, is without merit.

XI.

THE COURT DID NOT EMPHASIZE ONE VIEW OF THE CASE BY UNDUE REPETITION IN ITS INSTRUCTIONS.

In Instruction No. 5 (Tr. Vol. I, p. 106), the court stated:

“The claims against the two defendants must be considered by you separately and you should, in each case, determine whether the plaintiff is entitled to recover against both of the defendants

or only one of them. You may, if you so find, return a verdict against both defendants jointly or against either of them."

At the request of appellees, this instruction was amended so that it specified:

"The claims against the two defendants must be considered by you separately and you should, in each case, determine whether the plaintiff is entitled to recover against both of the defendants or only one of them, *or against neither.*" (Italics ours.)

Certainly this did not constitute undue emphasis on the part of the court and, had the instruction not been corrected, the jury might well have felt that it was mandatory for them to return a verdict against both of the defendants or one of them.

XII.

THE VERDICT WAS NOT CONTRARY TO THE WEIGHT OF EVIDENCE AND THERE IS NO INDICATION THAT THE JURY IGNORED MATERIAL EVIDENCE BECAUSE THEY FOUND APPELLANT HAD TESTIFIED FALSELY AS TO IMMATERIAL FACTS.

Counsel contends that the verdict is contrary to the weight of all the evidence. No request was made for a directed verdict.

"Generally the sufficiency of the evidence to authorize a recovery, or sustain a defense, will be reviewed in the appellate court when, and only when, that question has properly been raised in

the lower court by one of the methods or forms of procedure available in the particular jurisdiction or under the particular circumstances of taking a case or question from the jury . . .”

4 *C.J.S.*, Sec. 299.

In the subject case, no motion was made by counsel for appellant for a directed verdict. This learned court has frequently ruled that the question of sufficiency of the evidence will not be considered on appeal where a motion for a directed verdict was not made at the trial of the case. *Dayton Rubber Mfg. Co. of Delaware v. Sabra*, 63 F.2d 865; *Rosborough v. Chelan County, Wash.*, 53 F.2d 198; *Swift & Co. v. Daly*, 44 F.2d 40; *Sacramento Suburban Fruit Lands Co. v. Elm*, 29 F.2d 233; *Southern Pac. Co. v. Johnson*, 8 F.2d 993; *Steil v. Holland*, 3 F.2d 776; *Equitable Life Assur. Soc. of U. S. v. MacDonald*, 96 F.2d 437, cert. den. 59 S.Ct. 86, 305 U.S. 624.

Counsel contends that the only statements made by the witness Tuengel inconsistent with statements made at other times were

(1) By means of a letter wherein he referred to a sign on the basement door after first having denied, on the witness stand, that there was any sign on the door; and

(2) His denial that he had ever been convicted of a crime. Counsel has ignored many other false statements made by the appellant on the witness stand, many of which deal with very material aspects of the case. Thus the following false statements made by

appellant may well have been considered by the jury, in addition to the two referred to by counsel:

(1) Appellant stated that his net earnings were around \$3,000 to \$3,500 a year but, in answer to interrogatories, admitted that his earnings were \$1,620.14 in 1951 and \$1,803.55 in 1950. (Tr. Vol. II, p. 50.)

(2) Appellant claimed that he broke his shoulder in the fall (Tr. Vol. II, p. 23), but medical evidence showed otherwise. (Tr. Vol. II, pp. 98 and 241.)

(3) Appellant contended that he wore his cast for fifty-four days and that he marked those days on the calendar. (Tr. Vol. II, pp. 41 and 63.) The medical evidence revealed that the cast was on for three weeks. (Tr. Vol. III, p. 389.)

(4) Appellant stated that he did not know who had called him to the hospital (Tr. Vol. II, pp. 16, 52, 53), yet, when he was cross-examined as to why he did not knock before opening the door, he testified that Mr. Cresa had sent him a note asking him to come to the hospital and to come to the room without knocking. (Tr. Vol. II, p. 57.)

(5) Appellant stated that he was in great pain at any time that he used his shoulder after the accident, and that he was unable even to dress himself (Tr. Vol. II, pp. 44, 45, 46), yet an impartial witness testified to the fact that, while his arm was in a sling, appellant, after looking up and down the roadway, proceeded to remove his arm from the sling and vigorously to use a broom in cleaning off the wheels of his car. (Tr. Vol. III, pp. 370 to 373.)

There was no objection made to the instruction of the learned trial judge pertaining to the applicable law when a witness has testified falsely. The court's Instruction No. 10 specifically stated: "You should not, therefore, be misled by discrepancies in unimportant matters or in testimony which is immaterial to the issues." (Tr. Vol. II, p. 116.) The instruction as a whole accurately sets forth the law and properly guided the jury in its consideration of the weight to be given to testimony.

CONCLUSION.

The points raised by appellant on this appeal, almost without exception, deal with questions not properly presented to the trial court or not properly set forth in appellant's statement of points relied upon on this appeal. It is respectfully submitted that none of the specifications set forth constitute error on the part of the learned trial court, and certainly none constitute prejudicial error. There was ample evidence upon which the jury based its verdict in favor of the appellees and upon which the trial court denied appellant's motion for new trial. Accordingly, it is respectfully submitted that the judgment of the court below should be affirmed.

Dated, Juneau, Alaska,

September 21, 1956.

FAULKNER, BANFIELD & BOOCHEVER,
By R. BOOCHEVER,
Attorneys for Appellees.

No. 15201

United States
Court of Appeals
for the Ninth Circuit

RALPH E. WILLIAMS, as Trustee in Bankruptcy of the Estate of George F. Elliff, an individual doing business as Pine Supply Co., bankrupt, and PEARL K. LANNIN,
Appellants,

vs.

TWIN CITY COMPANY, TWIN CITY LUMBER CO., JOHN W. HUNTER, FRANKLIN SUPPLY CORPORATION, SOUTHWEST MANAGEMENT CORP., H. A. COLLINS and WILLIAM R. RAMSAY, Appellees.

Transcript of Record

In Two Volumes
VOLUME I.

(Pages 1 to 328, inclusive)

Appeal from the United States District Court for the
Northern District of California
Southern Division

FILED

DEC - 3 1956

No. 15201

United States
Court of Appeals
for the Ninth Circuit

RALPH E. WILLIAMS, as Trustee in Bankruptcy of the Estate of George F. Elliff, an individual doing business as Pine Supply Co., bankrupt, and PEARL K. LANNIN,
Appellants,

vs.

TWIN CITY COMPANY, TWIN CITY LUMBER CO., JOHN W. HUNTER, FRANKLIN SUPPLY CORPORATION, SOUTHWEST MANAGEMENT CORP., H. A. COLLINS and WILLIAM R. RAMSAY, Appellees.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 328, inclusive)

Appeal from the United States District Court for the
Northern District of California
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amendment to Complaint.....	49
Answer of Pearl K. Lannin to Complaint.....	33
Answer of Twin City Co., et al. to Complaint..	41
Answer to Cross-Complaint.....	45
Appeal:	
Certificates of Clerk to Transcript of Record on	72, 74
Notice of	69
Order Extending Time to Docket Record on	72
Specification of Points on (USCA).....	668
Undertaking for Costs and Damages on.....	70
Certificates of Clerk to Transcript of Record on Appeal	72, 74
Complaint	5
Exhibit A—Installment Note Dated Oct. 6, 1953 for \$28,000.00.....	26

Complaint—(Continued)

Exhibit B—Agreement Dated Oct. 8, 1953, George F. Elliff, Trustor, Louis Pasquini, Trustee and Pearl K. Lannin, Beneficiary	27
Cross-Complaint of Pearl K. Lannin.....	34
Excerpt From Docket Entries.....	3
Findings of Fact and Conclusions of Law.....	51
Judgment	66
Names and Addresses of Counsel.....	1
Notice of Appeal.....	69
Order Extending Time to Docket Record on Appeal	72
Order for Judgment.....	50
Specifications of Points to Be Relied Upon (USCA)	668
Transcript of Proceedings and Testimony.....	75
Arguments:	
Mr. C. Huntington Jacobs.....	596, 659
Mr. Robert Jacobs.....	625
Mr. Shapro	627
Witnesses:	
Barnhardt, Juanita H. —direct (C. H. Jacobs).....	415

Transcript of Proceedings—(Continued):

Witnesses—(Continued):

Baum, Joe N.

—direct (C. H. Jacobs).....	203, 241
—cross (Shapro)	260
—recalled, redirect (Shapro).....	432
—recross (R. Jacobs)	439
—redirect (C. H. Jacobs).....	448

Elliff, George F.

—direct (C. H. Jacobs).....	76
—redirect (C. H. Jacobs).....	165, 188
—recalled, redirect (C. H. Jacobs).....	308
—recross (Shapro)	319
—redirect (R. Jacobs).....	365, 371
—redirect (Shapro)	410
—recross (C. H. Jacobs).....	412

Collins, Howard

—direct (Shapro)	494
—cross (C. H. Jacobs).....	499

Hunter, John W.

—direct (Shapro)	536
—cross (C. H. Jacobs).....	556
—redirect (Shapro)	594

Jacobs, C. Huntington

—direct	452
—cross (Shapro)	456

Transcript of Proceedings—(Continued):

Witnesses—(Continued):

Jacobs, Robert

—direct	467
—cross (Shapro)	469
—redirect (C. H. Jacobs).....	469

Lannin, Pearl K.

—direct (C. H. Jacobs).....	420
—cross (Shapro)	428
—redirect (R. Jacobs).....	429
—direct (R. Jacobs).....	459

O'Connor, Timothy

—direct (C. H. Jacobs).....	134
—cross (Shapro)	139

Pasquinelli, Louis

—direct (C. H. Jacobs).....	144
—cross (Shapro)	161
—redirect (R. Jacobs).....	161

Ramsay, William W.

—direct (Shapro)	514
—cross (C. H. Jacobs).....	529

Robidoux, Henry

—direct (C. H. Jacobs).....	121
—cross (Shapro)	127
—redirect (R. Jacobs).....	129

Transcript of Proceedings—(Continued):

Witnesses—(Continued):

Swanson, Mrs. Bea

—direct (Shapro)	470
—cross (C. H. Jacobs).....	475, 482
—redirect (Shapro)	492, 493
—recross (R. Jacobs).....	492

Undertaking for Costs and Damages on Appeal 70

—

11-11-11

11-11-11

11-11-11





NAMES AND ADDRESSES OF COUNSEL

ROBERT N. JACOBS,
709 Bank of America Building,
San Jose, California,

C. HUNTINGTON JACOBS,
234 Marshall Street,
Redwood City, California,
Counsel for Appellants.

SHAPRO and ROTHSCILD,
155 Montgomery Street,
San Francisco, California,
Counsel for Appellees.



In the United States District Court, Northern
District of California, Southern Division

No. 34590-Civil

RALPH E. WILLIAMS, as Trustee in Bank-
ruptcy of the Estate of George F. Elliff, an
individual doing business as PINE SUPPLY
CO., Bankrupt, Plaintiff,

vs.

TWIN CITY COMPANY, also known as TWIN
CITY LUMBER CO., and herein called the
“OLD FIRM” a firm of copartners, TWIN
CITY LUMBER CO., herein called the “NEW
FIRM”, a firm of joint adventurers, JOHN
W. HUNTER, individually and as a member
of said “OLD FIRM”, FRANKLIN SUP-
PLY CORP., a corporation; SOUTHWEST
MANAGEMENT CORP., a corporation, H. A.
COLLINS and WILLIAM W. RAMSAY, in-
dividually, and as members of said “NEW
FIRM”, AUDREY MAE ELLIFF and
PEARL K. LANNIN, Defendants.

EXCERPT FROM DOCKET ENTRIES

1955

Apr. 21—Filed complaint and issued summons.

21—Filed answer of Pearl K. Lannin.

21—Filed cross-complaint of Pearl K. Lannin.

* * * * *

Aug. 19—Filed answer of defendants to complaint.

1955

Aug. 19—Filed answer of defendants to cross-complaint * * * * *

Nov. 21—Court trial.

22—Further trial.

23—Further trial.

28—Further trial.

29—Further trial.

* * * * *

Dec. 8—Arguments and submission of case.

* * * * *

14—Filed order for judgment vs. plaintiff on counts 1, 2 and 4 and for plaintiff vs. defts. in sum \$4816.62 on counts 3 as amended, and against cross-complainant Lannin on cross-complaint. Counsel for defts. other than Lannin to prepare findings, conclusions and judgment. (Hamlin)

* * * * *

1956

Mar. 30—Filed findings and conclusions.

30—Entered judgment—filed March 30, 1956 —for plaintiff vs. Twin City Company aka Twin City Lumber Co., John W. Hunter, Franklin Supply Corp., Southwest Management Corp., H. A. Collins and Wm. W. Ramsay each in sum \$4816.62 plus interest from March 30, 1956 and costs; on count 3. Plaintiff to take nothing on 2nd and 4th counts and x-complainant Pearl K. Lannin take nothing vs. defts. except costs. (Hamlin)

* * * * *

1956

Apr. 30—Filed notice of appeal by Williams and Lannin.

30—Filed appeal bond in sum \$250.00.

30—Filed appellants' designation of record on appeal. * * * * *

June 5—Filed order extending time to lodge record in Court of Appeals to July 10, 1956.
(Hamlin)

[Title of District Court and Cause.]

COMPLAINT

[Plenary suit by trustee in bankruptcy to avoid a fraudulently incurred obligation, to recover money fraudulently paid thereon, to recover money preferentially paid, and to recover damages for fraud.]

Ralph E. Williams, as such trustee in bankruptcy, complains of the defendants above named and avers as follows:

First Count

I.

On July 10, 1954, in the United States District Court for the Northern District of California, Southern Division, one of the creditors of George F. Elliff, herein called the Bankrupt, filed a petition for the involuntary adjudication of said Elliff and thereby instituted against him a proceeding in bankruptcy numbered "43322" and entitled, "In the Matter of George F. Elliff d.b.a. Pine Supply Co., Alleged Bankrupt", wherein such proceed-

ings were thereupon had that, on or about September 3, 1954, the said Court regularly made, entered, and filed an Adjudication of Bankruptcy by the terms of which it adjudged said George F. Elliff to be a bankrupt under the Act of Congress relating to Bankruptcy, and on or about October 1, 1954, Ralph E. Williams, plaintiff herein, was regularly elected and appointed the trustee in bankruptcy of the estate of said bankrupt, and on or about October 6, 1954, plaintiff's bond as such trustee was duly approved by the order of said Court. Plaintiff has ever since been and is the duly appointed, qualified and acting Trustee in Bankruptcy of the Estate of said bankrupt, and sues herein in his capacity as such Trustee.

II.

Defendant Twin City Company, herein called the "Old Firm", is and at all times herein mentioned was, a firm of copartners doing business in this Northern District and elsewhere under the latter name, and, until December 31, 1953, under the alternative name of "Twin City Lumber Co.", also. The defendant John W. Hunter, who resides in the Southern District of California, is, and at all times herein mentioned was, a member of said Old Firm. The defendant John W. Hunter is, and has always been, its President and Manager, and together with the defendant William W. Ramsay, who was its agent and employer at all times until the close of business on December 31, 1953, conducted on its behalf all of its dealings with the Bankrupt,

which are hereinafter averred. Until the latter time the business of the Old Firm included the lumber supply business which consisted of supplying lumber, (including lumber products), to wholesalers; but at the latter time the Old Firm transferred the latter business, together with its said alternative name and most of its assets, to the present Twin City Lumber Co., the New Firm mentioned below, which, in consideration of that transfer, thereupon undertook to pay and discharge all of the then existing obligations and liabilities of the Old Firm. The assets so transferred included the guaranteed and secured promissory note which is hereinafter mentioned and which the Old Firm then owned and held; and the New Firm has ever since been and now is the owner and holder of said note.

III.

Defendant Twin City Lumber Co., herein called the "New Firm", is and ever since December 31, 1953, has been a firm of joint adventurers comprising two corporations, namely, the defendants, Franklin Supply Corp. and Southwest Management Corp., and two individuals, namely, the defendants, H. A. Collins and said William W. Ramsay, both of whom reside in this Northern District, and engaged in conducting the said lumber supply business within this Northern District and elsewhere. Defendant John W. Hunter is and has always been its President and General Manager, and the President, the General Manager and the owner of all or nearly all of the outstanding capital stock

of its corporate member, Franklin Supply Co., and with the assistance of its individual member, the said William W. Ramsay, has conducted on its behalf all of its dealings relating to said promissory note since it acquired the same as aforesaid.

IV.

Each of the defendants, Franklin Supply Corp. and Southwest Management Corp., is, and ever since October 1, 1953, or theretofore, has been a corporation duly created, organized, and existing under and by virtue of the laws of a sovereignty as yet unknown to plaintiff and doing business as a corporation in the State of California and within this Northern District.

V.

The defendant Audrey Mae Elliff has been joined as a party defendant herein because she has declined to join herein as a party plaintiff.

VI.

At all of the times herein mentioned which antedated July 10, 1954, said bankrupt owned a wholesale and retail lumber business known as "Pine Supply Co." and located, as was also its stock in trade, upon certain premises occupied by him in the City of San Jose, County of Santa Clara, State of California. Except during a period of about two months which began on or about August 20, 1953, and ended on or about October 16, 1953, throughout which the latter business was not operated, the Bankrupt operated his said business at all of the

times herein mentioned which antedated the time, about June 20, 1954, when it was finally closed by attachments and finally ceased operation. Throughout its existence, which began later in 1952, the latter business was consistently in a failing condition; that is to say, it consistently and heavily lost money, consistently failed to earn sufficient gross income to enable it to pay its debts as they matured, and continuously accumulated an ever increasing amount of unpaid indebtedness. At all times herein mentioned the Bankrupt was insolvent in every sense of that term, and owed to many creditors debts "provable in bankruptcy," as defined by the Bankruptcy Act, but was, until his adjudication as aforesaid, determined to continue his said business. At all times herein mentioned, the said John W. Hunter and William W. Ramsay were well aware of the said failing condition of the Bankrupt's said business, of the said Bankrupt's insolvency as aforesaid, and of his determination to continue said business.

VII.

On or about May 4, 1954, the Bankrupt and the Old Firm made and entered into an agreement evidenced by letters and herein called the "May Agreement," by the terms of which they agreed in effect that a field warehouse of a bonded warehouseman be, (as it thereupon was), established on the Bankrupt's said premises; that all existing stock in trade of the Bankrupt and all future acquisitions of stock in trade delivered to him should be, (as they

were), promptly deposited by him in said warehouse; that the Old Firm should, (as it did), open and keep an open account with the Bankrupt upon which he might, (as he did), purchase from time to time from the Old Firm merchandise for use as a part of his stock in trade; that as security for his payment to it of the current balance shown by that open account to be owing by him, warehouse receipts evidencing all of such deposits should be, (as they were), issued to the Old Firm by said warehouseman as such deposits were made; and that either the Old Firm or the Bankrupt might terminate the May Agreement by notice at any time.

VIII.

On or about August 20, 1953, the Old Firm, in accordance with the May Agreement, notified the Bankrupt that the latter agreement was terminated. The Old Firm then held, but only as security for its said open account, warehouse receipts theretofore issued to it pursuant to that agreement, which evidenced all of his then existing stock in trade, and was consequently in a position to suspend the operation of his business at any time by refusing to release his stock in trade for delivery to his customers. At the latter time also the Old Firm held, (as the Old Firm still does), a number of unpaid checks drawn by him and payable to its order, in the amount of over \$50.00 each, which from time to time during the existence of said business, he had given to it for value, but all of which upon presentation had been denied payment

and returned to it for lack of sufficient funds in the bank accounts on which they were respectively drawn; and all of which, as he then was, to its knowledge aware, it was holding pending such action as it might take or cause to be taken regarding them. The amount of each of these unpaid checks had, upon such refusal of payment thereof, been debited, not upon said open account but upon another, different, and unsecured account which then was, (and still is), kept by the Old Firm, and which is herein called the "bad check account."

IX.

The Old Firm then claimed, as plaintiff is informed, believes, and so avers, that the Bankrupt was indebted to it in the total sum of about \$42,000.00; of which about \$14,000.00 was the current balance then owed by him upon its said open account, secured as aforesaid, for merchandise sold and delivered to him under the May Agreement; and about \$15,000.00 was the balance owed by him on those unpaid checks according to its bad check account, which was, (as it still is), wholly unsecured; while the remainder was the aggregate amount of a number of other and different claims concerning which the plaintiff is as yet insufficiently informed to aver any more than that they aggregated in amount about \$13,000.00 and were, (as they still are), wholly unsecured. At the latter time, also, as the Old Firm knew, the Bankrupt was and had long been, heavily indebted to numerous other creditors whose claims against him were of a

nature to be provable in bankruptcy as defined by the Bankruptcy Act, and many of whom were threatening him with suit and attachment or with execution; and was, as aforesaid, insolvent, but nevertheless determined to continue his said business if he possibly could.

X.

Under these circumstances, and upon terminating the May Agreement, as aforesaid, the Old Firm informed the Bankrupt that it would not release any of his stock in trade for delivery to any of his customers or at all unless, nor until, he substantially reduced his indebtedness to it and made some new arrangement satisfactory to itself, and that unless he complied promptly with these requirements, it would proceed by the use of its warehouse receipts (and otherwise to put him out of business completely and permanently). In response to this information the Bankrupt, by several payments, finally, on or about September 20, 1953, discharged and extinguished the current balance owed by him as aforesaid on the said secured open account and thereby brought the latter account to a balance of zero, at which it remained until after the completion of the October Transaction set forth below. The Old Firm, however, continued to hold its said warehouse receipts and to refuse to permit any use by the Bankrupt of his stock in trade, and thereby continued to suspend the operation of his business, until the completion of said October Transaction.

XI.

On response, also, to the same information, the Bankrupt attempted to formulate and effectuate a new arrangement which would be satisfactory to the Old Firm, but the latter attempt was unsuccessful, until the Old Firm proposed to the Bankrupt and the Bankrupt just prior to October 6, 1953, agreed to the new arrangement which was actually effectuated by the said October Transaction. The latter consisted of the following events, namely: On or about October 6, 1953, and October 8, 1953, two attorneys employed by the Bankrupt drafted, under and in accordance with directions which were then given to them by the Old Firm, the guaranteed note and "Trust Agreement," true copies of which are hereto annexed, marked respectively "Exhibit A" and "Exhibit B," and hereby expressly referred to and made part of this First Count. On or about October 10, 1953, said note was signed by the Bankrupt and the defendant Audrey Mae Elliff, his wife, as co-makers, the endorsement thereon guaranteeing its payment was signed by Mrs. Pearl K. Lannin, the mother of his wife, the said "Trust Agreement" was executed by the Bankrupt as "Trustor," by Louis Pasquinelli, Esq., one of his said attorneys, as "Trustee," and by the said Mrs. Lannin as "Beneficiary," the original of said guaranteed note with a true copy of said "Trust Agreement" were tentatively approved by the defendant Ramsay on behalf of the Old Firm, and delivery of said guaranteed note with an original or true copy of said "Trust Agreement" was made by the Bank-

rupt to the Old Firm. Thereupon the Old Firm surrendered to the Bankrupt all of the said warehouse receipts then held by it; the Bankrupt delivered the same to said warehouseman; and the latter, at the Bankrupt's request, issued, and the Bankrupt delivered to said Mrs. Lannin, new warehouse receipts evidencing all of his then existing stock in trade.

XII.

By the terms of said note, the Bankrupt and the defendant Audrey Mae Elliff promised to pay to the Old Firm, or its order, the sum of \$28,000.00 plus interest thereon at 6% per annum in four semi-annual installments, commencing with February 1, 1954, or in one lump sum in the event of default. By the terms of said guaranty the said Mrs. Lannin guaranteed payment of said note. Said "Trust Agreement" and all of the transfers on the part of the Bankrupt which were required thereby were intended by the Old Firm, the Bankrupt, and said Mrs. Lannin, not only to indemnify her against liability as such guarantor, but also, by subrogation, to secure the payment of said note and to appropriate exclusively to the purpose of securing such indemnification and said note, all of the then existing stock in trade of the Bankrupt, all stock in trade thereafter acquired by him from whatever source and whether on credit or otherwise, at least twenty per cent of all funds thereafter realized by his said business, and so much more of the latter funds as might be required for the payment of said note. Pursuant to the latter

intent, the said "Trust Agreement" provided by its terms that "primarily" for her protection the Bankrupt should transfer to said Mrs. Lannin herself all of his existing and future stock in trade; should collect and transfer to his said "Trustee" under said "Trust Agreement" any and all funds, including both money and accounts receivable, thereafter realized by him in connection with his said business; and that the latter "Trustee" should in any and all events devote twenty per cent of all such funds so transferred to him exclusively to the payment of said note, unless otherwise instructed by said Mrs. Lannin or her attorney therein named. No such instructions were ever given and all of the provisions just mentioned were at all times fully observed and executed until after July 10, 1954.

XIII.

The said "Trust Agreement" also provided in effect that the present and future transfers of stock in trade which, as aforesaid, it required the Bankrupt to make to his said guarantor, should be made by the issuance and delivery to her of warehouse receipts under a warehousing arrangement such as would enable the Bankrupt to continue to operate his said business in a normal manner; that he, (not his "Trustee"), should collect the existing and future accounts receivable of his said business; that he (not his "Trustee"), should issue such checks as were issued in payment of the expenses of said business, but should issue such checks against trust funds to be deposited in his checking account for

that purpose by his "Trustee"; and that no notice should be given his debtors of the transfers which said "Trust Agreement" required him to make to his "Trustee" of all of his (future accounts receivable). During the preparation of said "Trust Agreement" it was also, but orally, agreed by the Old Firm and the Bankrupt that no notice whatever be given his creditors of said "Trust Agreement" nor of any of the transfers required thereby, nor of said October Transaction. The purpose of the provisions and oral agreement mentioned in this paragraph was, as both the Old Firm and the Bankrupt well knew, to keep the Bankrupt's then existing and future creditors in ignorance of the latter transaction as completely and for as long a time as possible, lest any of them prevent or avoid by legal action the effects upon them of said October Transaction.

XIV.

Neither the said note nor any of the transfers required by said "Trust Agreement" was intended by the Old Firm or the Bankrupt to discharge or secure any antecedent debt of his. No present advance was made to him by anyone in consideration of said October Transaction. The only thing which he or his estate obtained by the latter transaction was the said surrender of warehouse receipts, by means of which and of the required transfer to said Mrs. Lannin of his entire existing stock in trade the latter was, as aforesaid, rendered security for the payment of said note instead of for the

payment of the already extinguished balance on said open account.

XV.

At all times during and after said October Transaction the Old Firm had knowledge of, and the said Mrs. Lannin had knowledge of, or reason to know all of the premises; and at the time of its acquisition of said note as aforesaid and ever since, the New Firm also has had knowledge of all of the premises.

XVI.

The execution of said guaranteed note and "Trust Agreement," as aforesaid, were procured as aforesaid by the Old Firm for the purpose and with the intent and effect of thereby hindering, delaying and defrauding the Bankrupt's creditors—not including itself; and the Bankrupt, as the Old Firm knew, executed said note and "Trust Agreement," procured the signature on said note of the defendant Audrey Mae Elliff, and procured the execution of said guaranty and of said Trust Agreement as aforesaid, for the same purpose and with the same intent last mentioned.

XVII.

Several of those—not including Mrs. Lannin nor any of the defendants herein—to whom the Bankrupt owed such provable debts when said note, guaranty, and "Trust Agreement" were executed, as aforesaid, still owned and held the latter debts on July 10, 1954, and have since proved them in said bankruptcy proceeding.

XVIII.

Because as aforesaid the said October Transaction added nothing to the Bankrupt's capital, and deprived him of the current use of twenty per cent of the gross earnings of his said failing business, he was thereafter compelled, in order to continue the latter, to finance its operation, as he did, by incurring new debts which he could not and did not pay as they matured, or at all. Many of those new debts were and are "provable in bankruptcy" as defined by said Act and have been proved in said bankruptcy proceeding.

XIX.

Upon the said note and from funds of the Bankrupt, he has made or caused to be made, (as they were), payments to the New Firm aggregating the total sum of \$5,000.00. Of the latter sum, \$2,500.00 was paid during January of 1954, while the remaining \$2,500.00 was paid on and after April 24, 1954, and prior to July 10, 1954. (Recovery by the Trustee of additional payments made subsequent to the latter date is not waived but is the subject of summary proceedings in the said proceeding in bankruptcy and is therefore not claimed in this plenary suit.)

XX.

All of the things hereinbefore alleged occurred in the State of California. Plaintiff accordingly says that said note and every one of said payments was and is fraudulent in respect of creditors of said Bankrupt, not only under Section 67d of said Act but also under the laws of said State.

XXI.

In said bankruptcy proceeding there are now pending and undecided summary proceedings wherein said Mrs. Lannin claims ownership of all of the stock in trade of the bankrupt on hand in said warehouse on July 10, 1954, by virtue of such warehouse receipts issued and delivered to, and now held by her pursuant to said "Trust Agreement," while the plaintiff of such trustee in bankruptcy, claims all of the latter stock in trade as property of said estate upon the ground inter alia that, as above appears, the latter claim of said Mrs. Lannin cannot be sustained, unless the said note is valid and enforceable, and that by reason of the premises averred in this First Count, said note was and is, as aforesaid, fraudulent and void. The invalidity, however, of the said note cannot with finality be determined in said summary proceedings because the New Firm, which owns and holds said note, is not, and, as the Court by its order therein has regularly determined, cannot be made a party to the latter proceedings.

XXII.

Because, as aforesaid, the latter claim of said Mrs. Pearl K. Lannin would be vitally affected by a judgment herein declaring said note to be as contended by plaintiff, fraudulent and void; plaintiff believes and says that she is not only a proper but a necessary party to this suit, and she has therefore been joined as a party defendant herein.

Second Count

I.

Each and all of the averments made in Paragraphs I to V, both inclusive, of the foregoing First Count are true and are hereby expressly referred to, reiterated and made part of this Second Count.

II.

Within four months next preceding July 10, 1954, the Bankrupt made or caused to be made, as they were, the following payments of money to the New Firm from the funds of the Bankrupt; namely, on April 24, 1954, \$700.00; on May 5, 1954, \$300.00, and on June 16, 1954, \$1,500.00; or in all \$2,500.00.

III.

All of said payments were made on account of an antecedent obligation; namely, the promissory note which is mentioned in Paragraph II of said First Count, and a true copy of which, marked "Exhibit A," is hereto annexed and hereby expressly referred to and made part hereof.

IV.

When said payments were made, the Bankrupt was insolvent, as the New Firm then knew or had probable cause to know; and as it also knew or should have known, the effect of each and all of said payments was to enable it to obtain a greater percentage of its debt than several other creditors to whom, or to which, the Bankrupt then owed debts of the same class.

Third Count

I.

Each and all of the averments contained in Paragraphs I, III, IV, and V of the foregoing First Count are true and are hereby expressly referred to, reiterated, and made part of this Third Count.

II.

Within four months next preceding July 10, 1954, the Bankrupt made or caused to be made, as they were, to the New Firm, the following payments of money from the funds of the Bankrupt; namely, on or shortly after March 25, 1954, \$3,170.37; and on or shortly after March 25, 1954, \$446.25; or a total of \$3,616.62.

III.

Both of said payments were made on account of an antecedent obligation; namely, a debt which, in November of 1953, the Bankrupt incurred to Twin City Company, a co-partnership, for merchandise sold and delivered in the latter month, and which, on January 1, 1954, said co-partnership had transferred to the New Firm.

IV.

When said payments were made, the Bankrupt was insolvent, as the New Firm then knew or had probable cause to know; and as it also knew or should have known, the effect of each and all of said payments was to enable it to obtain a greater percentage of its debt than several other creditors to whom, or to which, the Bankrupt then owed debts of the same class.

Fourth Count

I.

Each and all of the averments contained in Paragraphs I to XX, both inclusive, of the foregoing First Count are true, are hereby reiterated, and together with the annexed Exhibits A and B, therein mentioned, are hereby expressly referred to and made part of this Fourth Count.

II.

When, as aforesaid, the Old Firm proposed the new arrangement effected by the October Transaction, including the securing of said note indirectly by said Trust Agreement and by the transfers which the latter required, the Bankrupt, as the Old Firm well knew, agreed to that proposal only because the Old Firm's actual control over his entire existing stock in trade and its possession of said unpaid checks enabled it at its pleasure to destroy his business and virtually ruin him so that he was, and realized he was, almost completely under its domination and control. It then was, however plainly apparent to the Old Firm that because of his insolvency, any transaction which effectuated that arrangement and each of the subsequent transfers of his assets and earnings which that arrangement would require of him (if he continued his business as he was to its knowledge determined to do) would necessarily involve his committing an act or several acts of bankruptcy and render increasingly probable the institution of a successful proceeding in bankruptcy by several of his increasingly numerous

creditors for his involuntary adjudication. It then was equally apparent, also, that for his or her own protection the guarantor of his note would in any such proceeding be virtually forced to claim all of his stock in trade as against any receiver appointed therein and against his trustee in bankruptcy, and that heavy expense to his estate would be involved in investigating the merits of such claim, in discovering the fraud involved in that new arrangement, in opposing such claim, and in determining the rights of the trustee.

III.

In the bankruptcy proceeding actually instituted, as alleged in Paragraph I of said First Count, a receiver was duly appointed and duly qualified as such for the purpose of safeguarding said estate against any sequestration or diversion of the Bankrupt's assets under said note and "Trust Agreement" and of investigating the fraud apparently involved in said October Transaction and of reducing to the receiver's possession the assets transferred thereunder. In the latter proceeding also the receiver first and then the present trustee has been for several months engaged in summary proceedings for the determination of the merits of the claim which said Mrs. Lannin has actually propounded therein as the transferee of the entire stock in trade of the Bankrupt, as well as in such investigation of said fraud both under Section 21a of the Bankruptcy Act and otherwise; and to these activities have necessarily devoted much of the at-

tention, time, and labor of their counsel in said bankruptcy proceeding and necessarily have employed also the services of a certified public accountant for the examination of financial records relevant to said fraud, and necessarily have instituted ancillary proceedings in the United States District Court for the Southern District of California for the examination there of witnesses resident and records located in the latter District relative to said fraud, all with the approval and under the authority of this Court in said bankruptcy proceeding; and necessarily have incurred thereby heavy expense to the said estate which has certainly amounted to more than \$1,000.00, and the full amount of which cannot be ascertained with certainty at this time but will probably approximate \$2,000.00.

IV.

The defendant, John W. Hunter, as plaintiff avers upon information and belief, is the individual who, as a member and the president and manager of the Old Firm and the president and manager of the New Firm, conceived, devised, proposed, and procured as aforesaid, the commission of said fraud by the bankrupt and the said payments to the New Firm upon his said fraudulently executed note.

Wherefore, plaintiff prays judgment as follows:

(i) That said note be declared fraudulent and void, both as against the trustee in bankruptcy and for all purposes; and that it be ordered delivered up and cancelled;

(ii) That as against the said New Firm, and each and all of the defendants, Franklin Supply Corp., a corporation, Southwest Management Corp., a corporation, H. A. Collins and William W. Ramsay, as members thereof, plaintiff recover a money judgment on his foregoing First Count, in the sum of \$5,000.00, plus legal interest, or alternatively, and if such recovery be denied, a money judgment on his foregoing Second Count in the sum of \$2,500.00 plus interest;

(iii) That as against the said New Firm, and each and all of the defendant members thereof, plaintiff recover also a money judgment on his foregoing Third Count, in the further sum of \$3,616.62;

(iv) That on his foregoing Fourth Count the plaintiff recover also a money judgment against each and all of the defendants except the defendant, Audrey Mae Elliff, for actual damages in the sum of \$2,000.00 and against the said Old Firm and the defendant, John W. Hunter, and each of them, for penal damages in the additional sum of \$5,000.00; and

(v) That plaintiff recover also his costs herein, and such other, further and different relief as the Court may deem proper.

/s/ C. HUNTINGTON JACOBS,
Attorney for Plaintiff.

EXHIBIT A
INSTALLMENT NOTE

(Interest Separate)

\$28,000.00 San Jose, California October 6, 1953

In installments, and at the times hereinafter stated, for value received, We, George F. Elliff and Audrey Mae Elliff, his wife, promise to pay to Twin City Company, doing business as Twin City Lumber Company, 1100 South Beverly Drive, Los Angeles, California, the principal sum of Twenty-Eight Thousand (\$28,000.00) Dollars with interest from date hereof on deferred payments until paid at the rate of six (6%) per cent per annum, payable as hereinafter set forth. Said principal sum payable in four (4) installments as follows:

Ten thousand, seven hundred (\$10,700.00) Dollars on February 1, 1954;

Four thousand, two hundred (\$4,200.00) Dollars on August 1, 1954, plus interest;

Six thousand (\$6,000.00) Dollars on February 1, 1955, plus interest; and,

Seven thousand, one hundred (\$7,100.00) Dollars on August 1, 1955, plus interest.

And we, agree that in case of default in the payment of any said installments, such unpaid installments shall bear interest from the date of their respective maturity until paid at the rate of six (6%) per cent per annum, and that if any one of said installments or interest due hereon is not paid within thirty (30) days after the same becomes due and payable, the whole of the principal sum then re-

maining unpaid, together with the interest that shall have accrued thereon, shall forthwith become due and payable at the election of the holder of this note, without notice. Principal and interest payable in lawful money of the United States.

George F. Elliff

Audrey Mae Elliff (his wife)

I guarantee payment of the foregoing obligation.

Pearl K. Lannin,

Mrs. John (Pearl K.) Lannin,

a widow

M. Henry Robidoux,

Witness to Mrs. Lannin's

signature

EXHIBIT B

TRUST AGREEMENT

This Agreement made and entered into this 8th day of October, 1953, by and between George F. Elliff, hereinafter referred to as Trustor, Louis Pasquinelli, Attorney at Law, hereinafter referred to as Trustee, and Pearl K. Lannin, hereinafter referred to as Beneficiary.

Witnesseth:

Whereas, the Trustor, doing business under the name and style of Pine Supply Company is indebted to the Twin City Company, doing business as Twin City Lumber Company, in the sum of Twenty Eight Thousand (\$28,000.00) Dollars and as the result thereof, Trustor and his wife have executed an installment promissory note to the Twin City

Company, doing business as Twin City Lumber Company, in the said sum of Twenty Eight Thousand (\$28,000.00) Dollars; and

Whereas, Pearl K. Lannin, also known as Mrs. John Lannin, (Beneficiary herein named) has signed the said promissory note as a guarantor and it is the desire of all parties to this agreement that this Trust Agreement be carried out primarily for the purpose of protecting the said Pearl K. Lannin, and to hold her harmless or indemnify her as guarantor in the said promissory note; now, therefore:

It is agreed by and between these parties as follows:

That the Trustor does hereby agree to transfer, set over, assign and convey unto the Beneficiary all of the stock-in-trade (being primarily rough and finished lumber) located at the place of business of Trustor at 1565 Almaden Avenue, San Jose, California, which said stock-in-trade shall be handled on a bonded warehousing agreement with a legitimate and qualified bonded warehouseman. That none of the said stock-in-trade or any and all stock-in-trade hereafter purchased in connection with Trustor's business shall be released to the Trustor, or anyone else, except upon the authorization of the Beneficiary, and in her absence, her Attorney, Henry Robidoux. That in such warehousing arrangement, the said warehouseman shall act as the agent of the Beneficiary. That in this regard, it is agreed that the warehousing transaction will be set up in such a way as to afford the Beneficiary the desired protection, but at the same time, enable the Trustor to

conduct his business in the usual manner.

That it is agreed that this warehousing arrangement shall not cover only the present inventory in the approximate amount of Twenty Four Thousand Four Hundred Ninety Two (\$24,492.00) Dollars, but all that stock-in-trade hereafter purchased by the Trustor in connection with the said business is, likewise, to be placed under the same warehousing arrangement.

That the Trustor agrees to collect all Accounts Receivable, as well as any and all other monies which may be due to him in connection with his business and to turn the same over to the Trustee as the said monies are collected. It is acknowledged in this regard, that at the present time, the Trustor has approximately Seventeen Thousand (\$17,000.00) Dollars in Accounts Receivable.

That as the stock-in-trade and/or any portion thereof is sold by the Trustor, he shall turn over to the Trustee therefor either the cash realized from the sale thereof, or the Accounts Receivable resulting from said sale, which said cash and/or Accounts Receivable shall be the property of the Beneficiary and be retained in the trust herein created.

That the Trustee shall deposit any and all monies received by him by the Trustor in the Anglo California National Bank, San Jose, California, in an account entitled Louis Pasquinelli, Trustee for Pearl K. Lannin, and that no monies shall be withdrawn by the said Trustee from the said account except in the performance of the terms of this Trust Agreement.

That the Trustee shall be authorized to disburse to the Trustor such sums as may accrue for salaries for employees in connection with Trustor's business, said salaries to be confirmed by the Trustor before payment thereof shall be made.

That it is agreed that the Trustor shall be allowed a monthly salary of Four Hundred (\$400.00) Dollars per month, plus actual costs of fuel used in connection with the operation of his automobile in the business.

That all accountant fees, trustee fees and attorney's fees shall be paid by the Trustee in the course of the administration of the said trust upon vouchers properly authenticated by the Trustor.

That the Trustee shall be authorized to make payments from trust funds to creditors of the Trustor in the usual course of business upon presentation of properly authenticated vouchers.

That from funds received by the Trustee there shall be set aside and ear-marked, twenty (20%) per cent of all such funds, the purpose being to accumulate, if possible, sufficient monies with which to meet the payments to become due upon the said promissory note. That at no time, and under no circumstances, except with the written consent of the Beneficiary, or in her absence, M. Henry Robidoux, her attorney, shall the funds in the hands of the Trustee be reduced below the said twenty (20%) per cent.

That the Trustor shall be permitted to have a Petty Cash account not to exceed One Hundred

(\$100.00) Dollars and upon depletion thereof, the said Petty Cash account shall be replenished by the Trustee upon receipt of a proper accounting from the Trustor.

That the Trustee shall be furnished with a weekly record of all sales and business transacted by the Trustor.

That in order to alleviate as much as possible the manual work involved in the administration of this trust, it is agreed that the Trustor and/or his accountant shall submit to the Trustee the proper invoices and vouchers, along with checks drawn by the Trustor in payment thereof—the said checks to be drawn upon the Trustor's personal account—and in order to forestall the possibility of attachment or other levy upon the said account, the said checks to be certified—and in turn, the said Trustee shall deposit from the Trust Account into the account of the Trustor sufficient monies to honor the said checks, and the Trustee shall thereupon mail the checks to the persons entitled thereto.

That it is specifically understood and agreed that the Trustee shall not be liable—nor does he assume any liability—in connection with the administration of this trust other than such as may result from his breach of the same.

That at any time that the said Beneficiary shall be relieved of her obligation on the said promissory note, then the trust herein created shall thereupon terminate and this agreement shall no longer be of any force and effect, and all property held by the

Trustee at such time shall be returned to the Trustor.

That at any and all reasonable time either the Trustor or the Beneficiary shall have the right to require an audit of the Trustee's Account in the administration of his trust.

That all future accounts receivable shall be turned over to the trustee as hereinbefore provided, but that the debtors thereon shall not be notified of such assignment because of business reasons, and in this connection, the Trustee shall not be liable for any losses which may result from failure of notice to the debtors.

That the Trustee does hereby accept this trust and agrees to carry out the terms thereof as herein specified.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first hereinabove written.

George F. Elliff,

Trustor

Louis Pasquinelli,

Trustee

Pearl K. Lannin,

Beneficiary

Duly Verified.

[Endorsed]: Filed April 21, 1955.

[Title of District Court and Cause.]

ANSWER OF PEARL K. LANNIN

Defendant, Pearl K. Lannin, answers the Complaint of Plaintiff herein filed as follows, to-wit:

This Defendant alleges that she did not know the actual financial condition of George F. Elliff, Bankrupt described in the Complaint filed herein, nor of his business until long after she guaranteed his note, described in said Complaint, and signed the "Trust Agreement" mentioned therein, and that she supposed his note was being given in payment for merchandise.

Wherefore, Defendant, Pearl K. Lannin, prays that plaintiff take nothing from defendant, Pearl K. Lannin.

/s/ ROBERT N. JACOBS,
Attorney for Defendant, Pearl
K. Lannin

Duly Verified.

[Endorsed]: Filed April 21, 1955.

In the United States District Court for the Northern District of California, Southern Division

No. 34590

RALPH E. WILLIAMS, as Trustee in Bankruptcy, etc.,
Plaintiff,
vs.

TWIN CITY LUMBER COMPANY, etc., et al.,
Defendants.

PEARL K. LANNIN,
Defendant and Cross-Complainant,
vs.

TWIN CITY COMPANY, also known as TWIN CITY LUMBER CO., and herein called the "OLD FIRM", a firm of copartners, TWIN CITY LUMBER CO., herein called the "NEW FIRM", a firm of joint adventurers, JOHN W. HUNTER, individually and as a member of said "OLD FIRM", and FRANKLIN SUPPLY CORP., a corporation, SOUTHWEST MANAGEMENT CORP., a corporation, H. A. COLLINS and WILLIAM W. RAMSAY, individually, and as members of said "NEW FIRM", Cross-Defendants.

CROSS-COMPLAINT OF PEARL K. LANNIN

Contemporaneously with the filing herein of her Answer to the Complaint of Plaintiff herein filed, the defendant Pearl K. Lannin, pursuant to Rule 13g. of the Federal Rules of Civil Procedure, makes and files herein her Cross-Complaint against her co-

parties, the cross-defendants above named, as such, and complaining of said cross-defendants, alleges as follows:

I.

Except as hereinafter alleged, each and all of the averments contained in the First Count of said Complaint are true, and subject only to that exception, are hereby adopted and reiterated by this Cross-Complainant and together with the two exhibits annexed to said Complaint and mentioned in Paragraph XI of said First Count, are hereby expressly referred to and made part of this Cross-Complaint as though set forth in haec verba.

II.

When, as alleged in those paragraphs, the Old Firm proposed the new arrangement effected as therein alleged, by the October Transaction mentioned therein, George F. Elliff therein and herein called the Bankrupt, was, as the Old Firm was well aware, completely under its domination because of the facts, therein alleged, that it still retained warehouse receipts representing all of his stock in trade and was still refusing to release any of said stock in trade for delivery to his customers, and that it still retained also, as it still does, the unpaid checks therein mentioned; and, as this cross-complainant believes and so avers, everything hereinafter alleged to have been done or omitted by the Bankrupt was done at the instance and direction of the Old Firm and in furtherance of its design to effectuate that proposed new arrangement.

III.

On or about September 28, 1953, the Bankrupt requested this cross-complainant to endorse as guarantor a note for \$28,000.00 which he proposed to execute, together with his wife, daughter of this cross-complainant, to the order of the Old Firm. In support of that request he falsely and fraudulently represented to this cross-complainant that said note was to be given in payment for new merchandise which his business urgently required and by the resale of which he could and would quickly pay said note and reap a handsome profit which would enable him to expand his business and ensure it a brilliant success; and that his business already was profitable and flourishing, although in need of the additional financing which such profit would supply. In support of that request he also offered to secure this cross-complainant against any possible liability on the requested guaranty by transferring to her his entire stock in trade and all subsequent replacements thereof or additions thereto, and also by impounding for her benefit and under a trust arrangement all of the future proceeds of his present accounts receivable and all other money which his business might realize until any possibility of such liability was extinguished; and he falsely and fraudulently represented to her that such security would fully protect her. This plaintiff believed those representations and relied thereon in executing the guaranty and "Trust Agreement" mentioned in said First and Fourth Counts. As he was well aware, she did not know or suspect when

she did so and the Bankrupt fraudulently omitted to disclose to her, that he was insolvent or otherwise than in a healthy financial condition, nor that he then had or would thereafter acquire, necessarily or otherwise, any creditors who would be hindered, delayed, defrauded, or harmed at all much less that he would be placed in any danger of being adjudicated a bankrupt, by the execution or guaranteeing of that note or the execution of that "Trust Agreement" or by any of the transfers for which that "Trust Agreement" provided, because, as he knew, she only vaguely understood the terms or purport of said note and "Trust Agreement" and supposed that any creditors of said business could and would be paid by him promptly and in full, and because he fraudulently omitted to give her any information to the contrary. Had it not been for the premises in this paragraph alleged, this plaintiff, as the Old Firm well knew or ought to have known, would not have executed any such guaranty or "Trust Agreement" or participated in the said October Transaction at all or accepted any, or the benefit of any, of the said transfers. But this cross-complainant's first knowledge and understanding of the actual facts regarding these matters was obtained by her during the proceeding in involuntary bankruptcy which is mentioned in Paragraph I of the said Complaint of the trustee, and she first realized the fraudulent character of said note, guaranty, "Trust Agreement" and transfers after she had propounded in said bankruptcy proceeding her claim to the stock in trade so transferred to her.

IV.

Prior to any such discovery by this cross-complainant, and upon the demand of the New Firm, she made to the New Firm two payments of \$1,000.00 each or \$2,000.00 in all on account of said guaranty; that is to say,

a payment of \$1,000.00 on or about August 26, 1954, and — a payment of \$1,000.00 on or about September 16, 1954; all to her damage in the sum of \$2,000.00. When it acquired said guaranteed note, and when it demanded and received said payments from this cross-complainant the New Firm was well aware of all of the premises.

V.

When it proposed said new arrangement as afore-said and participated in said October Transaction as alleged by the Trustee in said Paragraph XI of his said First Count, the Old Firm well knew or ought to have known that such a transaction and the obligations assumed and transfers required thereby were likely, if not almost certain to result in the institution, within a year after completion of said transaction, of a proceeding in bankruptcy for the involuntary adjudication as a bankrupt of said George F. Elliff; and in his adjudication as such notwithstanding all the secrecy in which such transaction and transfers might be enshrouded; and that in any such bankruptcy proceeding the guarantor of such note would be virtually compelled and virtually certain to assert her supposed rights under said "Trust Agreement", and would almost cer-

tainly be subjected to heavy expense in attempting to maintain and establish the same against any receiver and against the trustee appointed in such proceeding.

VI.

In the involuntary proceeding mentioned in said Paragraph I of the said First Count of the trustee's complaint herein, a receiver was appointed and qualified on or about September 9, 1954, and thereupon procured in the latter proceeding an order requiring this cross-complainant to show cause inter alia why any assets of the Bankrupt under her control should not be administered upon as a part of his estate. In response to that order this cross-complainant thereupon filed in the latter proceeding an answer whereby she claimed ownership of all of the stock in trade of the Bankrupt under the warehouse receipts issued and delivered to and held by her pursuant to said "Trust Agreement". The Summary proceedings thus initiated to determine her rights to said stock in trade consumed several months, and together with the investigation required for the preparation and presentation of the facts involved therein, necessarily have already subjected her to an expense of \$1,000.00 for the services of counsel whom she necessarily retained for that purpose. Her said claim has now been submitted and is awaiting decision; which must, apparently, be adverse to her because of the uncontradicted evidence which was adduced upon the trial of the latter claim that said note and all of said October Transaction was in fact fraudulent. She will

ask leave to supplement this present cross-complaint by reporting said decision when the latter is rendered.

VII.

By reason of the premises this cross-complainant has already suffered actual damage in the sum of at least \$3,000.00.

Wherefore, this cross-complainant prays:

(1) That the said note and guaranty be declared fraudulent and void; and ordered delivered up and cancelled;

(2) That this cross-complainant have judgment against each and all of the cross-defendants above named for actual damage in the sum of \$3,000.00 and for penal damages in the further sum of \$9,000.00; or the total sum of \$12,000.00;

(3) That this cross-complainant recover from the latter cross-defendants her costs incident to this cross-complaint; and,

(4) That this cross-complainant have such other, further and different relief as the court may deem proper.

/s/ ROBERT N. JACOBS,
Attorney for Defendant and
Cross-Complainant

Duly Verified.

[Endorsed]: Filed April 21, 1955.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Come now Twin City Company, also known as Twin City Lumber Co., John W. Hunter, Franklin Supply Corp., a corporation, Southwest Management Corp., a corporation, H. A. Collins, and William W. Ramsay, Defendants above-named, and answer as follows the Complaint of Plaintiff herein filed.

I.

Admit the allegations contained in paragraphs numbered I, II, III and IV in said Complaint set forth, except that Defendants deny the allegation contained in paragraph II that Defendant John W. Hunter is and always has been President of the "Old Firm".

II.

Deny, for lack of information or belief sufficient to enable these Defendants otherwise to answer in that regard, each and every, all and singular, the allegations contained in paragraphs numbered V and VI in said Complaint set forth; and specifically deny that Defendants John W. Hunter and/or William W. Ramsay at all of the times herein mentioned were well aware or at all aware of the alleged failing condition of the Bankrupt's said business, or of the said Bankrupt's insolvency and/or of his determination to continue said business.

III.

Admit the allegations of paragraph VII of said Complaint, saving and excepting that these Defend-

ants deny that the "May Agreement" referred to therein was made and entered into on or about May 4, 1954, and in that connection they allege that said Agreement was made on or about April 27, 1953, and that substantially all of the stock-in-trade deposited in the field warehouse referred to therein was stock-in-trade theretofore delivered into said warehouse by said "Old Firm" and theretofore bought and paid for by said "Old Firm" and then belonged to said "Old Firm", and was subject to release from said warehouse to said Bankrupt upon his payment therefor; and that the contents of said warehouse was security for said "Old Firm" on obligations of said Bankrupt to said "Old Firm" arising out of the purchase of stock-in-trade by said Bankrupt by said "Old Firm".

IV.

Deny each and every, all and singular, the allegations contained in paragraphs numbered VIII, IX, and X.

V.

Deny each and every, all and singular, the allegations contained in paragraph numbered XI in said Complaint contained, saving and excepting that these Defendants admit the allegations in paragraph XI commencing with the words "on or about" on line 27, page 7, of said Complaint and ending on line 30, page 7, with the words "his wife", thereof and those allegations contained in paragraph XII of said Complaint commencing on line 12, page 8 and ending with the word "note" on line 18, page 8;

and these Defendants deny, for lack of information or belief sufficient to enable them to answer in that regard, each and every, all and singular, the other allegations contained in paragraph XII.

VI.

Deny, for lack of information or belief sufficient to enable these Defendants otherwise to answer in that regard, except as may be disclosed by Exhibit "B" annexed to said Complaint, each and every, all and singular, the allegations contained in paragraph XIII in said Complaint contained.

VII.

Deny each and every, all and singular, the allegations contained in paragraphs XIV, XV, and XVI in said Complaint contained and in this connection they allege that at none of the dates mentioned in said Complaint was the open account therein referred to owing by said Bankrupt to said "Old Firm" extinguished.

VIII.

Deny, for lack of information or belief sufficient to enable these Defendants otherwise to answer in that regard, each and every, all and singular the allegations contained in paragraphs numbered XVIII, XIX, XX, XXI and XXII thereof, saving and excepting that these Defendants admit that such of the things alleged in said Complaint prior to said paragraph XX which did occur pursuant to the admissions of these Defendants heretofore contained herein did so occur in the State of California.

Second Count

I.

Deny, for lack of information or belief sufficient to enable these Defendants otherwise to answer in that regard, each and every, all and singular the allegations contained in paragraphs II in said Complaint set forth.

II.

Deny each and every, all and singular, the allegations contained in paragraph IV in said Complaint contained.

Third Count

I.

Deny, for lack of information or belief sufficient to enable these Defendants otherwise to answer in that regard, the allegations contained in paragraphs II and III of said Complaint contained.

II.

Deny each and every, all and singular, the allegations contained in paragraph IV thereof.

Fourth Count

I.

Admit and/or deny with respect to paragraphs I to XX, both inclusive, of Plaintiff's First Count which are by reference made part of paragraph I of his said Fourth Count which have heretofore been admitted and/or denied in connection with said First Count.

II.

Deny each and every, all and singular, the allegations contained in paragraphs numbered II in said Complaint contained.

III.

Deny, for lack of information or belief sufficient to enable these Defendants otherwise to answer in that regard, the allegations contained in paragraphs numbered III of said Complaint, saving and excepting that these Defendants admit the appointment and qualification of a Receiver in said bankruptcy proceedings.

IV.

Deny each and every, all and singular, the allegations contained in paragraph IV in said Complaint contained.

Wherefore, Defendants pray that Plaintiff take nothing herein and that these Defendants have judgment for their costs herein incurred; and for all proper relief.

SHAPRO & ROTHSCILD

/s/ By DANIEL ARONSON, JR.

Attorneys for Defendants

Affidavit of Service by Mail Attached.

[Endorsed]: Filed August 19, 1955.

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT

Come now the Cross-defendants above-named and

answer as follows the Cross-Complaint of Pearl K. Lannin heretofore filed herein.

I.

Allege that said Cross-complaint does not state facts sufficient to constitute a cause of cross-claim, or cause of action against these Cross-defendants, or any of them.

II.

Alleges that prior to the commencement of the above-entitled proceeding and/or the filing of the said cross-complaint Cross-defendant Twin City Lumber Co., commenced in the Superior Court of the State of California, in and for the County of Santa Clara, an action therein pending and numbered 93552 and wherein Pearl K. Lannin, Cross-complainant herein was a Defendant, and in which said action Cross-defendant Twin City Lumber Co., seeks judgment against said cross-complainant upon the Promissory Note more particularly in said cross-complaint referred to; and that Summons upon said Complaint in said Superior Court action No. 93552 was duly issued by the Clerk of said Superior Court and by said Cross-defendant Twin City Lumber Co., caused to be served upon said Cross-complainant, and thereby said Superior Court acquired jurisdiction over the subject matter of said Complaint and of said Cross-complaint with respect to the said Promissory Note, prior to the said commencement of the above-entitled action and/or the said filing herein of said cross-complaint; and that, therefore, the above-entitled Court has no jurisdic-

tion over the subject matter of said Cross-complaint herein.

III.

Admit and/or deny with respect to the First Count of Plaintiff's Complaint in said action which are by reference made part of paragraph I of said Cross-complaint which have heretofore been admitted and/or denied in connection with said First Count of said Plaintiff's Complaint.

IV.

Deny each and every, all and singular, the allegations contained in paragraphs numbered II and VII of said Cross-complaint.

V.

Deny for lack of information or belief sufficient to enable these Defendants otherwise to answer in that regard, each and every, all and singular, the allegations contained in paragraphs numbered III and IV of said Cross-complaint.

VI.

Deny each and every, all and singular, the allegations contained in paragraph numbered V of said Cross-complaint.

VII.

Deny, for lack of information or belief sufficient to enable these Defendants otherwise to answer in that regard, the allegations contained in paragraph VI of said Cross-complaint, saving and excepting that these Defendants admit the appointment and qualification of a Receiver in the bankruptcy pro-

ceedings therein referred to and the issuance of the Order to Show Cause and of the filing therein of the Answer thereto; and in that connection, these Defendants allege that they are not a party to and were not represented in and therefore are not and will not be bound by any decision which might be made by said Bankruptcy Court on the issues so joined by the Trustee and Cross-complainant herein and more particularly referred to as summary proceedings in said paragraph VI of said Cross-complaint.

Wherefore, these Cross-defendants pray that Cross-complainant take nothing herein and that these Cross-defendants be hence dismissed with their costs herein incurred; and that if the foregoing relief is not granted herein that these Cross-defendants will have a trial upon the merits of the issues joined upon said Cross-complaint by this Answer be had herein and that it be adjudged and decreed by this Court that the Promissory Note and Guaranty more particularly in said Cross-complaint described be declared valid and subsisting and between said Cross-complainant and these cross-defendants; and for such other, further and different Order, Judgment, Decree and relief as to this Honorable Court may seem proper in the premises.

SHAPRO & ROTHSCHILD

/s/ By DANIEL ARONSON, JR.

Attorneys for Cross-defendants

[Endorsed]: Filed August 19, 1955.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

By leave of Court first had and obtained the plaintiff above named hereby amends his Complaint herein as follows, to-wit:

First, by amending Paragraph II of the Third Count of said Complaint to read as follows:

“II.

“Within four months next preceding July 10, 1954, the Bankrupt made or caused to be, as they were, made, to the New Firm, the following payments of money from the funds of the Bankrupt; namely,

On or shortly after March 25, 1954. . . . \$3,170.37

On or shortly after March 25, 1954. . . . 446.25

On or about May 7, 1954. 1,200.00

or a total of. \$4,816.62”;

Second, by amending paragraph (iii) of the prayer of said Complaint by substituting the sum of \$4,816.62 for the sum of \$3,616.62 which now appears in the latter paragraph.

Wherefore, plaintiff prays judgment in accordance with the prayer of said Complaint as so amended.

/s/ C. HUNTINGTON JACOBS
Attorney for Plaintiff

State of California,
County of Santa Clara—ss.

Ralph E. Williams, being first duly sworn, says on oath as follows:

I am the duly appointed, qualified and acting Trustee in Bankruptcy of the Estate of George F. Elliff, bankrupt, and as such make this verification of the foregoing Amendment to Complaint. I have read said Amendment and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

/s/ RALPH E. WILLIAMS

Subscribed and sworn to before me this 18th day of November, 1955.

[Seal] /s/ HELEN IVANCOVICH
Notary Public in and for the County
of Santa Clara, State of California

[Endorsed]: Filed November 21, 1955.

[Title of District Court and Cause.]

ORDER

It is hereby ordered that judgment be entered against plaintiff on counts One, Two and Four of the complaint; in favor of the plaintiff on count Three of the complaint, as amended, in the sum of \$4,816.62; and against cross-complainant Lannin on the cross-complaint.

Counsel for defendants other than Lannin and

Elliff to prepare findings of fact, conclusions of law, and judgment.

Dated: December 14, 1955.

/s/ O. D. HAMLIN

United States District Judge

[Endorsed]: Filed Dec. 14, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action upon the Complaint of Plaintiff and the Answer thereto heretofore filed herein by Twin City Company, also known as Twin City Lumber Co., John W. Hunter, Franklin Supply Corp., a corporation; Southwest Management Corp., a corporation; H. A. Collins, and William W. Ramsay, and upon the Answer thereto and the Cross-Complaint of Defendant and Cross-Complainant, Pearl K. Lannin, and the Answer to said Cross-Complaint heretofore filed herein by the Cross-Defendants above-named, and upon the issues so joined, having regularly come on for hearing before the above-entitled Court for trial, said Court sitting without a jury, a trial by jury of said issues having been expressly waived, commencing on the 21st day of November, 1955, said Plaintiff being represented by C. Huntington Jacobs, Esq., his attorney, the Defendants and Cross-Defendants Twin City Company, also known as Twin City Lumber Co., John W. Hunter, Franklin Supply Corp., a corporation; Southwest Management Corp.,

a corporation; H. A. Collins, and William W. Ram-say being represented by Messrs. Shapro & Rothschild (Arthur P. Shapro, Esq., and Daniel Aronson, Jr., Esq., appearing), their attorneys, and Defendant and Cross-Complainant, Pearl K. Lannin being represented by Robert N. Jacobs, Esq., her attorney, and no appearance having been made by or on behalf of Defendant Audrey Mae Elliff, and evidence, both oral and documentary, having been adduced by the respective parties upon the issues so joined, and the matters having been duly argued by counsel for the respective parties and submitted to the Court for decision, and the Court being fully advised in the premises, now makes the following

Findings of Fact
(First Count)

I.

That each and all of the allegations contained in paragraphs numbered I, II, III, IV and V of the First Count of Plaintiff's Complaint on file herein are true.

II.

That it is true that at all of the times mentioned in said First Count of said Complaint which antedated July 10, 1954 said Bankrupt owned a wholesale and retail lumber business known as "Pine Supply Co.", and located, as was also its stock-in-trade, upon certain premises occupied by him in the city of San Jose, County of Santa Clara, State of California; and that the Bankrupt operated his said business at all of the times herein mentioned

which antedated the time, about June 20, 1954, when it was finally closed by attachments and finally ceased operation; and that said Bankrupt, until his adjudication as such as aforesaid, was determined to and did continue his said business as aforesaid, and the said John W. Hunter and William W. Ramsay were well aware of said Bankrupt's said determination to continue his said business; and that except as herein in this paragraph above found to be true, each and all of the allegations of paragraph VI of the First Count of Plaintiff's said Complaint on file herein are untrue.

III.

That each and all of the allegations contained in paragraph VII of the Plaintiff's First Count of said Complaint are true, saving and excepting that the "May Agreement" in said paragraph VII referred to provided that warehouse receipts evidencing all such deposits should be (as they were) issued to the old firm by said warehouseman as security for all of the indebtedness of said Bankrupt which then and/or thereafter, during the term of said "May Agreement," were or to become owing to said old firm by said Bankrupt.

IV.

That on or about August 20, 1953, the old firm, in accordance with the May Agreement, notified the Bankrupt that the latter agreement was terminated; and that the old firm then held as security for all of the monies then owed to it by said Bankrupt

warehouse receipts theretofore issued to it pursuant to that Agreement, which evidenced substantially all of his then existing stock-in-trade, and was consequently in a position to suspend the operation of said Bankrupt's business at any time by refusing to release the stock-in-trade covered by said warehouse receipts for delivery to his customers; and that at the later time also, the old firm held (as the old firm did at the time of the trial of the above-entitled action) a number of unpaid checks drawn by him and payable to its order in the amount of over \$50.00 each, which from time to time during the existence of said business he had given to it for value, but all of which upon presentation had been denied payment and returned to it for lack of sufficient funds in the bank accounts on which they were respectively drawn; and all of which, as he then was, to its knowledge, aware, it was holding pending such action as it might take or cause to be taken regarding them, and the aggregate amount of which said unpaid checks had been on or before October 8, 1955 debited by said old firm to and became a part of its Note Receivable account from said Bankrupt; and that except as herein in this paragraph above found to be true, each and all of the allegations of paragraph VIII of the First Count of Plaintiff's said Complaint on file herein are untrue.

V.

That the old firm then claimed and it was a fact that at said time said Bankrupt owed to said old firm the sum of \$28,116.63, inclusive of the afore-

mentioned dishonored checks in the respective sums of \$2,500.00, \$741.26, and \$7,310.98, protest fees thereon in the sum of \$21.00, its warehouse account in the sum of \$17,416.05, and interest on its said warehouse account, accrued pursuant to the terms of said May Agreement, in the additional sum of \$127.34, and all of which said sum was then and there secured by the aforesaid warehouse receipts; and that at said time, as the old firm knew, said Bankrupt was and had long been indebted to numerous other creditors whose claims against him were of a nature to be provable in bankruptcy as defined by the Bankruptcy Act, but said Bankrupt, nevertheless, was determined to and did continue his said business as long as he could; and that except as herein this paragraph above found to be true, each and all of the allegations of paragraph IX of the First Count of Plaintiff's Complaint on file herein are untrue.

VI.

That under the circumstances outlined in the preceding paragraph hereof, and upon terminating the May Agreement, as aforesaid, the old firm informed the Bankrupt that it would not release any of his merchandise covered by the warehouse receipts thereon held by said old firm for delivery to any of his customers unless, nor until, he substantially reduced his indebtedness to it or made some new arrangement with respect thereto satisfactory to said old firm, and that unless he complied promptly with either of said alternatives, said old firm would proceed, by the use of its said ware-

house receipts, to lawfully realize upon same as security for the said indebtedness of said Bankrupt to said old firm; that in response to this information and between August 20 and September 28, 1953, the Bankrupt executed and delivered to the old firm on account of that indebtedness five checks aggregating \$13,447.98, all of which were dishonored on presentation and protested, three of which, aggregating \$10,552.18, have never been paid and were retained by the old firm until the time of the trial of this suit; that the old firm continued to hold its said warehouse receipts and to refuse to permit any use by the Bankrupt of his stock in trade until the completion of the October transaction as described below; and that except as herein in this paragraph above found to be true, each and all of the allegations of paragraph X of the First Count of Plaintiff's said Complaint on file herein are untrue.

VII.

In response, also, to the aforesaid information, said Bankrupt attempted to formulate and effectuate a new arrangement which would be satisfactory to the old firm and ultimately and on or immediately prior to October 6, 1953, said Bankrupt proposed and said old firm agreed to a new arrangement which was actually effectuated by the so-called "October transaction"; and that the latter consisted of the events more particularly set forth in paragraph XI of the First Count of Plaintiff's Complaint on file herein commencing with line 21, page 7, of said Complaint, and ending on line 10, page

8 thereof, saving and excepting that the said old firm did not give to the two attorneys employed by the Bankrupt directions for the preparation of said "Trust Agreement"; and that except as herein in this paragraph above found to be true, each and all of the allegations of paragraph XI of the First Count of Plaintiff's said Complaint on file herein are untrue.

VIII.

That the terms and conditions of the said Note and Trust Agreement were and are as set forth in Exhibit "A" and Exhibit "B" annexed to Plaintiff's Complaint.

IX.

That the allegations contained in paragraph XIII of the First Count of Plaintiff's Complaint commencing with the word "during" on line 25, page 9 thereof, and ending on line 2, page 10 thereof, are untrue.

X.

That neither the said Promissory Note nor the said "Trust Agreement" was intended by the old firm or by said Bankrupt to discharge any antecedent indebtedness of his to said old firm, but that thereby said old firm procured the guaranty of said Promissory Note for \$28,000.00 by said Pearl K. Lannin and surrendered as aforesaid the warehouse receipts, by means of which the merchandise of said Bankrupt covered thereby was, in fact, through new warehouse receipts issued by said warehouseman to said Pearl K. Lannin given as security to said Pearl K. Lannin for her said guaranty of said

Promissory Note to said old firm; and that except as herein in this paragraph above found to be true, each and all of the allegations of paragraph XIV of the First Count of Plaintiff's said Complaint on file herein are untrue.

XI.

That each and all of the allegations contained in paragraphs numbered XV, XVI and XVIII of the First Count of Plaintiff's said Complaint on file herein are untrue.

XII.

That each and all of the allegations contained in paragraph XVII of the First Count of Plaintiff's said Complaint on file herein are true, saving and excepting that said Pearl K. Lannin proved a claim in said bankruptcy proceeding in the sum of \$16,784.98.

XIII.

That upon said Note and from the funds of said Bankrupt payments were made to the new firm aggregating the total sum of \$5,000.00, of which \$2,500.00 was paid on January 15, 1954, and the remaining \$2,500.00 was paid between April 24, 1954 and June 16, 1954.

XIV.

That each and all of the allegations contained in paragraph XX of the First Count of Plaintiff's said Complaint on file herein are untrue, saving and excepting that it is true that all of the things as found in these findings occurred in the State of California.

XV.

That in and by an Order of the above-entitled Court made and entered herein by Hon. Bernard J. Abrott, Referee in Bankruptcy in charge of the bankruptcy proceedings of said George F. Elliff on the 18th day of August, 1955, the claim of said Pearl K. Lannin to ownership of the merchandise covered by her warehouse receipts which was at the time of the commencement of said bankruptcy proceedings in the said field warehouse of said Bankrupt was determined to be invalid as against Plaintiff herein.

XVI.

The Defendant, Mrs. Pearl K. Lannin, was a guarantor of the note mentioned herein and was and is a proper party defendant and cross-complainant in this suit.

(Second Count)**I.**

That such of the facts found above in connection with Plaintiff's First Count as are applicable to and referred to in paragraph I of his Second Count are hereby incorporated and made part of these Findings in connection with his said Second Count.

II.

That each and all of the allegations contained in paragraphs II, III and IV of the Second Count of Plaintiff's Complaint on file herein are true.

III.

That at the times mentioned in paragraph II of

the Second Count, by virtue of the warehouse receipts issued to and held by Pearl K. Lannin pursuant to the terms of the "Trust Agreement" referred to in the First Count, Defendant Twin City Lumber Company had security for its debt upon that portion of the stock-in-trade of said Bankrupt as was covered by said warehouse receipts.

(Third Count)

I.

That such of the facts found in connection with Plaintiff's First Count as are applicable to and referred to in paragraph I of his Third Count are hereby expressly referred to and made part of these Findings in connection with his said Third Count.

II.

That each and all of the allegations contained in paragraphs II (as amended November 21, 1955), III, and IV of the Third Count of Plaintiff's Complaint on file herein are true.

(Fourth Count)

I.

That such of the facts found in connection with Plaintiff's First Count as are applicable to and referred to in paragraph I of his Fourth Count are hereby expressly referred to and made part of these Findings in connection with his said Fourth Count.

II.

That each and all of the allegations contained in

paragraphs II and IV of the Fourth Count are untrue.

III.

That each and all of the allegations contained in paragraph III of the Fourth Count of Plaintiff's said Complaint on file herein are true.

(Cross-Complaint)

I.

This Court makes with respect to the Cross-Complaint of Pearl K. Lannin filed herein the same Findings with regard to those allegations of the First Count of Plaintiff's Complaint on file herein as are hereinabove made with respect to said First Count, to the extent that said allegations of said First Count are incorporated by reference in paragraph I of said Cross-Complaint.

II.

That each and all of the allegations contained in paragraph II of said Cross-Complaint are untrue.

III.

That on or about the 28th day of September, 1953, the Bankrupt requested Cross-Complainant to endorse as Guarantor a Note for \$28,000.00 which he proposed to execute, together with his wife, daughter of Cross-Complainant, to the order of the old firm; that in support of that request he also offered to secure Cross-Complainant against any possible liability on the requested guaranty by causing (1) to be issued to her warehouse receipts

upon the greater portion of his stock-in-trade of lumber then located in a field warehouse and covered by warehouse receipts issued to and held by Cross-Defendants and which were to be (as they subsequently were) released by the old firm in favor of Cross-Complainant and (2) by the terms and conditions of that said "Trust Agreement" described in Exhibit "B" annexed to Plaintiff's Complaint on file herein; and that except as hereinabove in this paragraph otherwise found true each and all of the allegations contained in paragraph III of said Cross-Complaint are untrue.

IV.

That each and all of the allegations in paragraph IV of said Cross-Complaint are untrue, saving and excepting that it is true that upon demand of the new firm Cross-Complainant made to the new firm the payments aggregating \$2,000.00 as more particularly in said paragraph IV set forth.

V.

That each and all of the allegations contained in paragraphs V and VII of said Cross-Complaint are untrue.

VI.

That each and all of the allegations contained in paragraph VI of said Cross-Complaint are true, saving and excepting that on or about the 18th day of August, 1955, Hon. Bernard J. Abrott, Referee in Bankruptcy in charge of the bankruptcy proceedings of said George F. Elliff, made and entered

an Order in the above-entitled Court invalidating the claim of said Pearl K. Lannin to ownership of the merchandise covered by her warehouse receipts which was at the time of the commencement of said bankruptcy proceedings in the said field warehouse of said Bankrupt.

Wherefrom, the Court draws and makes the following

Conclusions of Law

I.

That this is a plenary suit by the Trustee in Bankruptcy to recover transfers claimed to be fraudulent under Sections 60(b) and 67(d) of the Bankruptcy Act, 11 U.S.C.A. 96(b) and 107(d); and that the Court has jurisdiction of this suit under 11 U.S.C.A. 1, 11, 96(b), and 107(e).

II.

That neither the Promissory Note nor the Trust Agreement respectively denominated as Exhibits "A" and "B" annexed to said Plaintiff's Complaint were nor are fraudulent as against the creditors of George F. Elliff, bankrupt, under Section 67(d) of the Bankruptcy Act or under any other applicable statute of the State of California.

III.

That at the time of the receipt by said Defendants of the \$2,500.00 paid by said Bankrupt to Defendant Twin City Lumber Company and/or Twin City Company as alleged in paragraph XIX of Plain-

tiff's Complaint, within the four months next preceding the commencement of the Bankruptcy proceedings of said George F. Elliff, said Twin City Lumber Company and/or Twin City Company as its successor in interest as payee of the Promissory Note heretofore and therein referred to was a secured creditor within the meaning of Section 1 (28) of the Bankruptcy Act.

IV.

That defendants Twin City Company, also known as Twin City Lumber Co.; John W. Hunter; Franklin Supply Corp., a corporation; Southwest Management Corp., a corporation; H. A. Collins; and William W. Ramsay received a preference voidable under Section 60(b) of the Bankruptcy Act by virtue of the facts found to be true by this Court in connection with Plaintiff's Third Count, to the extent of \$4,816.62.

V.

That Plaintiff is entitled to judgment against Defendants Twin City Company, also known as Twin City Lumber Co.; John W. Hunter; Franklin Supply Corp., a corporation; Southwest Management Corp., a corporation; H. A. Collins; and William W. Ramsay in the sum of \$4,816.62, plus legal interest thereon from date of such judgment, together with his costs incurred in connection with the prosecution of the Third Count of his Complaint on file herein.

VI.

That Defendants Twin City Company, also known as Twin City Lumber Co.; John W. Hunter, Franklin Supply Corp., a corporation; Southwest Management Corp., a corporation; H. A. Collins; and William W. Ramsay are entitled to judgment against Plaintiff upon the First, Second and Fourth Counts of Plaintiff's Complaint on file herein and against Cross-Complainant on her Cross-Complaint herein filed, together with the costs incurred by defendants in connection therewith.

Let judgment be entered accordingly.

Dated: March 30, 1956.

/s/ O. D. HAMLIN

United States District Judge

[Endorsed]: Filed March 30, 1956.

In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 34590

RALPH E. WILLIAMS, as Trustee in Bank-
ruptcy, etc., Plaintiff,
vs.

TWIN CITY LUMBER COMPANY, etc., et al.,
Defendants.

PEARL K. LANNIN,
Defendant and Cross-Complainant,

vs.

TWIN CITY COMPANY, also known as TWIN CITY LUMBER CO., and herein called the "OLD FIRM", a firm of copartners, TWIN CITY LUMBER CO., herein called the "NEW FIRM", a firm of joint adventurers, JOHN W. HUNTER, individually and as a member of said "OLD FIRM", and FRANKLIN SUPPLY CORP., a corporation, SOUTHWEST MANAGEMENT CORP., a corporation, H. A. COLLINS and WILLIAM W. RAMSAY, individually, and as members of said "NEW FIRM", Cross-Defendants.

JUDGMENT

The above-entitled action upon the Complaint of Plaintiff and the Answer thereto heretofore filed herein by Twin City Company, also known as Twin City Lumber Co., John W. Hunter, Franklin Supply Corp., a corporation; Southwest Management Corp., a corporation; H. A. Collins, and William W. Ramsay, and upon the Answer thereto and the Cross-Complaint of Defendant and Cross-Complain-

ant, Pearl K. Lannin and the Answer to said Cross-Complaint heretofore filed herein by the Cross-defendants above-named, and upon the issues so joined, having regularly come on for hearing before the above-entitled Court for trial, said Court sitting without a jury, a trial by jury of said issues having been expressly waived, commencing on the 21st day of November, 1955, said Plaintiff being represented by C. Huntington Jacobs, Esq., his attorney, the Defendants and Cross-Defendants Twin City Company, also known as Twin City Lumber Co., John W. Hunter, Franklin Supply Corp., a corporation; Southwest Management Corp., a corporation; H. A. Collins, and William W. Ramsay being represented by Messrs. Shapro & Rothschild (Arthur P. Shapro, Esq., and Daniel Aronson, Jr., Esq., appearing), their attorneys, and Defendant and Cross-Complainant Pearl K. Lannin being represented by Robert N. Jacobs, Esq., her attorney, and no appearance having been made by or on behalf of Defendant Audrey Mae Elliff, and evidence, both oral and documentary having been adduced by the respective parties upon the issues so joined, and the matter having been submitted to the Court for decision, and the Court being fully advised in the premises and having heretofore made and filed herein its Findings of Fact and Conclusions of Law upon said issues, and good cause appearing therefor,

It is Hereby Ordered, Adjudged and Decreed that Plaintiff, Ralph E. Williams, as Trustee in Bankruptcy of the Estate of George F. Elliff, an individual doing business as "Pine Supply Co," Bankrupt,

do have and recover of and from Defendants, Twin City Company, also known as Twin City Lumber Co., John W. Hunter, Franklin Supply Corp., a corporation; Southwest Management Corp., a corporation; H. A. Collins, and William W. Ramsay, and each of them the sum of \$4,816.62 plus legal interest thereon from date hereof until paid, together with said Plaintiff's costs herein in connection with the Third Count of his Complaint on file herein and taxed at the sum of \$————; and

It Is Further Ordered, Adjudged and Decreed that said Plaintiff take nothing herein as against said Defendants, or any of them, by virtue of the First, Second and Fourth Counts of his said Complaint or any one of them and that said Defendants Twin City Company, also known as Twin City Lumber Co., John W. Hunter, Franklin Supply Corp., a corporation; Southwest Management Corp., a corporation; H. A. Collins and William W. Ramsay, have and recover of and from said Plaintiff their costs herein incurred in connection with said First, Second and Fourth Counts of Plaintiff's Complaint and taxed at the sum of \$22.00; and

It Is Further Ordered, Adjudged and Decreed that Pearl K. Lannin, Cross-Complainant herein, take nothing as against Cross-Defendants Twin City Company, also known as Twin City Lumber Co., John W. Hunter, Franklin Supply Corp., a corporation; Southwest Management Corp., a corporation; H. A. Collins and William W. Ramsay, or any of them, by reason of her Cross-Complaint on file herein and that said Cross-Defendants, and each of

them, do have and recover of and from said Cross-Complainant their costs herein incurred in connection with the said Cross-Complaint and taxed at the sum of \$22.00.

Dated at San Francisco in said District this 30th day of March, 1956.

/s/ O. D. HAMLIN
District Judge

Entered in Civil Docket March 30, 1956.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 30, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given:

That Ralph E. Williams, as such Trustee and Plaintiff, hereby appeals to the United States Court of Appeals for the Ninth Circuit from so much of the final judgment entered in this action on March 30, 1956, as denies to said Ralph E. Williams any recovery against the respondents above named, upon Counts I and IV of his Complaint herein filed, and awards to said respondents costs incurred by them in the defense of said Counts I and IV, and

That Pearl K. Lannin, as such Cross-Complainant, hereby appeals to the United States Court of Appeals for the Ninth Circuit from so much of the

said final judgment as denies to her any recovery on her Cross-Complaint herein filed, and awards to said respondents costs incurred by them in defense of said Cross Complaint.

/s/ C. HUNTINGTON JACOBS
Attorney for Plaintiff and Appellant
Ralph E. Williams.

/s/ ROBERT N. JACOBS
Attorney for Cross-Complainant and
Appellant, Pearl K. Lannin.

[Endorsed]: Filed April 30, 1956 .

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS AND DAMAGES ON APPEAL

Whereas, the Plaintiff and Appellant and the Cross Complainant and the Appellant in the above entitled action are about to appeal to the District Court of the United States for the Northern District of California, Southern Division, from a judgment entered against them in said action, in the above entitled Court on the 30th day of March, 1956, in favor of the respondents in said action, and denying to Plaintiff and Appellant any recovery under Counts I and IV of his Complaint herein, and denying Cross Complainant and Appellant any recovery on her Cross Complaint herein and awarding costs to defendants and respondents.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, the Central Surety and Insurance Corporation, a corporation duly organized and doing business under and by virtue of the laws of the State of Missouri, and duly licensed for the purpose of making, guaranteeing or becoming sole surety upon bonds or undertakings required or authorized by the laws of the State of California, does undertake and promise, on the part of the said Cross Complainant and Appellant, that said Cross Complainant and Appellant will pay all costs which may be awarded against her on the appeal, or on a dismissal thereof, not exceeding the sum of Two Hundred Fifty and No/100 Dollars (\$250.00) to which amount it acknowledges itself bound.

In Witness Whereof, the corporate seal and name of the said Surety Company is hereto affixed and attested at San Jose, California, by its duly authorized Attorney-in-Fact, this 30th day of April, 1956.

[Seal] CENTRAL SURETY AND INSURANCE
CORPORATION

/s/ R. B. SULLIVAN
Attorney-in-Fact

Power of Attorney Attached.

Notary Certification Attached.

[Endorsed]: Filed April 30, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
RECORD ON APPEAL

Good cause appearing therefor, it is

Ordered that the time for docketing the record on appeal in the above case be extended to July 10, 1956.

June 5, 1956.

/s/ O. D. HAMLIN,

United States District Judge

[Endorsed]: Filed June 5, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries

Complaint

Answer of Pearl K. Lannin

Cross-complaint of Pearl K. Lannin

Answer of Twin City Company, aka Twin City Lumber Co., John W. Hunter, Franklin Supply Corp., Southwest Management Corp., H. A. Collins and William Ramsay.

Answer of defendants to cross-complaint of Pearl
K. Lannin

Amendment to Complaint

Order for Judgment

Findings of Fact and Conclusions of Law

Judgment

Notice of Appeal

Appeal Bond

Designation of Record on Appeal

Order Extending Time to Docket Record on Ap-
peal

Reporter's Transcript of Proceedings, November
21, 22, 23, 28 and 29, 1955.

Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11,
12, 13, 14, 15, 15-a, 16, 17, 18, 19, 20 and 21

Defendants' Exhibits: A, B, C (Ident.), D
(Ident.), E, F, G, H, I, J and K.

Lannin Exhibit L-1.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court this
9th day of July, 1956.

[Seal]

C. W. CALBREATH,

Clerk,

/s/ By MARGARET P. BLAIR,

Deputy Clerk

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the original filed in this Court in the above-entitled case and constitute the supplemental record on appeal as designated by counsel for the appellant but not included in the original record for the reason they were not received from the Court Reporters at that time:

Reporter's Transcript of proceedings, Dec. 8, 1955.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 23rd day of July, 1956.

C. W. CALBREATH,
Clerk,

/s/ By MARGARET P. BLAIR,
Deputy Clerk

In the United States District Court for the
Northern District of California,
Southern Division

No. 34590

RALPH E. WILLIAMS, as Trustee in Bankruptcy of the Estate of GEORGE F. ELLIFF, an individual doing business as "PINE SUPPLY CO.," Bankrupt, Plaintiff and Appellant, and PEARL K. LANNIN,
Cross-Complainant and Appellant,

vs.

TWIN CITY COMPANY; TWIN CITY LUMBER CO.; JOHN W. HUNTER; FRANKLIN SUPPLY CORP., a corporation; SOUTHWEST MANAGEMENT CORP., a corporation; R. A. COLLINS and WILLIAM W. RAMSAY, Respondents.

REPORTER'S TRANSCRIPT

Monday, November 21, 1956

Before: Hon. Oliver D. Hamlin, Judge.

Appearances: For the Plaintiff and Appellant: C. Huntington Jacobs, Esq., for the Cross-Complainant & Appellant: Robert N. Jacobs, Esq., for the Respondents: Arthur P. Shapro, Esq. [1]*

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Monday, November 21, 1955

10:00 O'Clock A. M.

(Opening statements were made by the following counsel: Mr. C. Huntington Jacobs; Mr. Arthur P. Shapro; and Mr. Robert N. Jacobs.)

GEORGE F. ELLIFF

a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. C. Huntington Jacobs): Your full name is George F. Elliff, isn't it?

A. That's right.

Q. And what is your business or occupation?

A. Sales representative.

Q. Are you engaged in the lumber business?

A. Yes, sir.

Q. And have you been engaged in the lumber business for a considerable period of time?

A. Yes, sir.

Q. When did you start in that business?

A. 1936.

Q. When did you first meet, if you ever did, the defendant, Mr. Hunter?

A. In the spring of 1950.

Q. And what were you doing then? [2]

A. Operating a saw mill at Boonville, California.

Q. Now, did that concern have a name?

A. Coast Range Lumber Company.

(Testimony of George F. Elliff.)

Q. Did that concern have dealings with Mr. Hunter? A. Yes, sir.

Q. And did you have personal dealings with him?

A. I handled the dealings of Coast Range Lumber Company with Mr. Hunter, yes.

Q. When did that concern close its business, if it did?

A. It became inactive in the spring of 1952.

Q. And at that time did you have any conversation with Mr. Hunter about its affairs?

A. Yes, sir, I did.

Q. And about your own affairs? A. Yes.

Q. Where did these conversations take place, Mr. Elliff?

A. In Mr. Hunter's office in Los Angeles, California.

Q. In whose presence?

A. Well, on one occasion, a Mr. Charles Lannon was present.

Q. Mr. Charles Lannon, was he connected with this concern?

A. He was vice-president of the corporation.

Q. I see. Now, state what in reference to your affairs, in your financial condition, was said and by whom at that interview?

Mr. Shapro: To which we will object, your Honor, upon [3] the grounds it is incompetent, irrelevant and immaterial. The note in question is October, '53, the preferential payments in the spring of 1954. The question is directed to a time in 1952.

(Testimony of George F. Elliff.)

The Court: It's for the purpose of bringing notice to this——

Mr. Jacobs: That is right, sir, it's preliminary.

The Court: Answer the question.

The Witness: In the presence of Mr. Lannon you wanted to know what the conversation consisted of at that time?

Q. (By Mr. Jacobs): Yes.

A. Well, it was the paying off of a note that we owed Mr. Hunter that he had advanced money on certain lumber to be purchased by Twin City Company.

The Court: Well, now——

Q. (By Mr. Jacobs): Wait a minute. I asked you to tell us what conversation took place in reference to your financial condition.

A. I was getting——

Q. Oh, very well.

A. By referring to the fact that we had been a long time paying off some money that he had advanced. At the conclusion of this payoff he asked me what I intended to do personally after they closed the lumber company.

The Court: Asked what? [4]

A. What I intended to do personally. And he sympathized with the fact that we hadn't made any money and I had lost what I had in it personally.

Q. (By Mr. Jacobs): Did you have any subsequent conversations with Mr. Hunter regarding your personal financial condition? And by personal, I mean to include all of your condition, in-

(Testimony of George F. Elliff.)

cluding your business and other assets and liabilities. A. Not until 1953, I would say.

Q. And where did you have the first of the conversations, if there were more than one, in 1953?

A. I believe it was in Los Angeles again at his office.

Q. And who was present on that occasion?

A. Mr. Hunter and myself, I believe, was all.

Mr. Shapro: May we have the time a little more definite?

Q. (By Mr. Jacobs): About what time of the year was this?

A. This was in the early spring, I believe, in 1950.

The Court: 19 what?

A. 1953 it was.

Q. (By Mr. Jacobs): And who did you say was present?

A. Mr. Hunter and myself at that occasion.

Q. What was said and by whom in regard to your financial condition on that occasion?

A. Well, I was trying to establish myself in business again and had related to him the facts that I had this partner who was financially able to take care of the purse. [5]

The Court: Will you keep your voice up, please, Mr. Elliff?

A. I will try. I have a little throat trouble.

And I think I related to him that——

The Court: You related to him what?

A. That I wanted to go in this Pine Supply

(Testimony of George F. Elliff.)

business, that we had started it, and it had a very good possibility of making some money. That in essence is the gist of the conversation, I mean.

Q. (By Mr. Jacobs): Now, did he ask you anything about your personal financial affairs?

Mr. Shapro: Object to the form of the question, if your Honor please, upon the ground it is leading and suggestive. He has already asked for the substance of the conversation.

The Court: What is asked for is any conversation you had with Mr. Hunter at that time concerning your financial condition. If there was any such conversation, relate it, please.

The Witness: I think it was common knowledge——

The Court: We are required to deal in conversations and that is what has been asked for.

The Witness: At that particular time, I couldn't say that he did. It might have been discussed, but it was loosely discussed. [6]

The Court: But you can't recall what was said?

The Witness: Not on that particular occasion, no, sir.

Q. (By Mr. Jacobs): You had other conversations, as I understand it, with him about that matter?

A. In May of 1953 I spent a Sunday at his home in Los Angeles.

Q. Now, Mr. Elliff, you mentioned the fact that you had a partner or that you had told Mr. Hunter that you had one. Did you have one?

(Testimony of George F. Elliff.)

A. Yes, sir.

Q. And his name was what?

A. Louis Hodes.

Q. And what was the name of the concern, the partnership? A. Abbott-Lane.

Q. Now, when was Abbott-Lane formed?

A. November 1st, 1952.

Q. And who were the partners, all of them?

A. Mr. Hodes and myself.

Q. Was that partnership subsequently dissolved?

A. Yes.

Q. Did you put money into that partnership?

A. I did, yes.

Q. How much? A. \$2,000.00.

Q. Where did you get it?

A. I borrowed it. [7]

Q. From whom?

A. My mother-in-law, Mrs. Lamb.

Q. Did Mr. Hodes put money into it?

A. Yes, he did.

Q. And how much? A. Roughly \$2,000.00.

Q. And when that partnership was dissolved, what was its financial condition?

Mr. Shapro: Object to that, if your Honor please, upon the ground it calls for the opinion and conclusion of the witness. He can ask him what the assets were and what the liabilities were, but not the financial condition, if your Honor please.

The Court: I think that is probably correct.

Mr. Jacobs: I will reframe the question.

(Testimony of George F. Elliff.)

Q. What were its assets and liabilities in general terms, if you know?

A. I didn't know at that time, but after the audit was made the liabilities exceeded his assets.

Q. The liabilities exceeded the assets?

A. Yes, sir.

Q. Of the partnership? Now, then, Mr. Elliff, did that partnership have dealings with Twin City Company? A. They did.

Q. And what was the nature of those dealings?

A. We purchased truck and trailers and lumber for them.

The Court: You purchased lumber for them?

The Witness: Yes.

Q. (By Mr. Jacobs): What can you tell us about the manner in which payments were made for the purchases that you made for them?

A. I believe there were only three purchases we made as Abbott-Lane. The first purchase was on a trade acceptance, a 30-day trade acceptance signed by Mr. Hodes and myself.

The second two were to be on trade acceptance, but we never made out the trade acceptance; and in turn we discounted them. They were delinquent. But I remember, recall, taking \$5,000.00 to Mr. Hunter at one time in Los Angeles on the second purchase.

Q. Well, respecting the time that was elapsed between the purchase and the payment, what can you tell us about the payment?

A. The elapse of time between the purchases?

(Testimony of George F. Elliff.)

Q. Yes.

A. Well, I would say that we were always delinquent.

Q. You were always delinquent? A. Yes.

Q. Now, at that time what position did Mr. Hunter hold, if you know, in the Twin City Company, the old firm, as we call it?

A. I presumed he was part owner, if not the financial funds [9] behind it. I always carried that in my mind.

Q. Was he the man with whom you dealt when you dealt with that concern, or not?

A. I dealt with Mr. Collins, as well as Mr. Hunter. But Mr. Hunter always had the final word in everything.

Q. I see. Now, you spoke of other conversations that you had with Mr. Hunter during 1953 regarding your financial condition. You mentioned one that occurred very early in the spring, I think you said, of 1953. Let's ask when this partnership was dissolved: Do you recall?

A. I think I am correct in saying May 28, 1953.

The Court: The Abbott-Lane was dissolved May 28, 1953?

The Witness: There was a dissolution of partnerships. We had changed names. Prior to that we called it the Pine Supply Company, so the dissolution took place under Pine Supply Company.

The Court: Now, let's go back a little. When was Pine Supply formed?

The Witness: I believe the 1st of May we

(Testimony of George F. Elliff.)

changed the name over and settled on Pine Supply Company.

The Court: So that about the 1st of May Abbott-Lane changed its name to——

The Witness: Pine Supply Company.

The Court: Pine Supply. And then about the end of May——

The Witness: The 28th, I believe, is correct. [10]

The Court: What?

The Witness: The 28th of May there was a dissolution, Pine Supply was dissolved; the partnership of Hodes and Elliff was dissolved.

The Court: All right.

Q. (By Mr. Jacobs): Now, when, with reference to the dissolution of your partnership with Mr. Hodes did your conversation of '53 with Mr. Hunter take place, the one you have mentioned?

A. It was prior to the dissolution. I think it was around May 4th, the weekend of May 4th.

Q. I see. Where did that take place did you say?

A. At Mr. Hunter's home in Beverly Hills, California.

Q. I see. And at that time had there been any discussion between yourself and Mr. Hodes regarding the dissolution? A. No, sir.

Q. Did you have any discussion on that occasion regarding the dissolution with Mr. Hunter?

A. I wasn't even aware that there was going to be a dissolution myself.

Q. I see. Now, did you discuss the dissolution of partnership with Mr. Hunter prior to the dis-

(Testimony of George F. Elliff.)

solution itself? A. No, sir.

Q. Did the partnership known under its new name of Pine Supply Company continue to deal with the old firm? [11] A. Yes, sir.

Q. And when the dissolution occurred, which of the partners continued the business, if either?

A. I did.

Q. When Mr. Hodes withdrew from the partnership, on what terms did he withdraw?

A. It was rather a complicated dissolution because he had purchased a home from me and he owed me a balance on that home. And I cancelled that note and signed a note for what he considered was the assets of the company.

Q. Well, now, am I correct in understanding that you bought Mr. Hodes' interest in the partnership at the time of the dissolution? A. I did.

Q. And how much money in round figures?

A. I couldn't honestly say. I know I cancelled, I think, a \$6,000.00 note. I think it was in excess of \$6,000.00 and I signed—I believe it was closer to \$8,300.00, I believe, something like that.

Q. Mr. Elliff, when I refer to solvency, I mean the condition in which a man has as much assets in market value as the sum total of his debts. Having in mind what I mean by the term, when you took over that partnership, were you solvent or insolvent?

Mr. Shapro: I object to the question that it calls [12] for the opinion and conclusion of the witness.

The Court: I guess that is a matter for the

(Testimony of George F. Elliff.)

Court to determine, isn't it, counsel, from the evidence?

Mr. Jacobs: I can ask him the same question in another form, your Honor, simply to this extent:

Q. Did you at that time have as much assets in market value as you had debts?

Mr. Shapro: To which we will address the like objection, your Honor.

The Court: I suppose, counsel, what you should show is what assets he had and what liabilities he had. From that the Court can draw a conclusion.

Mr. Jacobs: I can get that more specifically from his accountant's testimony, I presume, your Honor.

The Court: What is that?

Mr. Jacobs: I say, I will have to show that more specifically by his accountant's testimony. He made the audit that he has referred to. But it does seem to me that he ought to be able—he ought to be entitled to testify whether he had as much assets as he had debts. At any particular time a man normally knows——

The Court: You may get to the same point because the witness undoubtedly can give the value of such assets as he has, what his opinion of the value of those assets is. We may get to the same point. But on the face of the objection, I think [13] we will have to do it that way.

Mr. Jacobs: I see, very well, sir.

Q. What did you consider was the total value

(Testimony of George F. Elliff.)

of all your assets at the time when you started out in partnership?

Mr. Shapro: Same objection, your Honor.

The Court: I think we have to find out what his assets were and then you can ask him his opinion of each asset, as to what it is worth.

Mr. Jacobs: Very well.

Q. What assets did you have at the time when you took over this partnership, this Pine Supply Company?

A. Well, I had this note for around \$6,000.00 by Mr. Hodes, which was——

The Court: Wait a minute. You had a note for \$6,000.00 signed by whom?

The Witness: Signed by Louis Hodes and Lillian Hodes.

The Court: Was that secured?

The Witness: No, no. It wouldn't have been more secure than they were, than they were financially secure.

The Court: Was it carried by any specific property?

The Witness: No, no. I think it was a four-months note. It was due the 1st of June, so it was almost due at the time of the dissolution.

Q. (By Mr. Jacobs): Now, did you still have that note after the dissolution? [14]

A. No.

Q. What did you have after the dissolution and when you started in on your own?

A. Well, I think the total assets were entirely

(Testimony of George F. Elliff.)

in Pine Supply, outside of maybe a couple of automobiles——

Q. And——

A. Just a minute. I had a lot. I had a lot left, a one-acre lot left on Mount Hamilton Road.

Q. What is the value of that?

A. Oh, roughly \$2500.00.

Q. And what would you say were the assets of Pine Supply in general terms?

A. I frankly didn't know at the time, I mean, at the dissolution. I didn't know until Mr. Baum made an audit in July.

Q. You eventually found out, did you not?

A. I did.

Q. All right. Tell us now what you found out.

A. The liabilities exceeded the assets by several thousand dollars.

Q. Well, what was the nature of the assets at the time when you first took over?

A. Pine lumber, plywood, molding.

Q. And did you also assume the debts of the partnership?

A. I assumed the liabilities of the purchase of, yes, of the partnership. [15]

Q. When you took over? A. Yes, sir.

Q. Now, then you spoke of subsequent conversations that you had with Mr. Hunter in 1953. Before we go into that, let me ask you whether under your individual ownership Pine Supply Company continued to deal with the old firm?

A. Yes, sir, they did.

(Testimony of George F. Elliff.)

Q. And what was the next conversation as near as you can remember that you had with Mr. Hunter in 1953?

A. It was on about the 22nd of May. I called him and told him that Mr. Hodes and I were dissolving partnership.

Q. And did you on that occasion have any discussion with him regarding your financial condition? A. Yes.

Q. Now, whereabouts did that conversation take place, did you say? A. That was by telephone.

Q. That was by telephone. Did you call him?

A. I called him.

Q. And where did you call him?

A. In Los Angeles.

Q. I see. You were then in San Jose?

A. I was in San Jose.

Q. By the way, let me supply this detail. The Pine Supply Company was located where? [16]

A. 1565 Almaden Road, San Jose.

Q. San Jose. Was that where its stock in trade was located? A. It was.

Q. Now, in this telephone conversation with Mr. Hunter, what was said and by whom regarding your financial condition?

A. He couldn't see how I could possibly take over.

The Court: What?

Q. (By Mr. Jacobs): Tell us what he said—I take it that is what you are trying to do?

A. That is what I am doing. That Mr. Hunter

(Testimony of George F. Elliff.)

couldn't possibly understand how I could take over and he would have to give it some thought if he was going to continue to do business with me.

Q. You said he did not see how you could take over? A. That's right.

Q. Did he explain that remark?

A. Well, he knew that I had very little assets myself.

Mr. Shapro: If your Honor please, he said "he knew." I move to strike it as a conclusion of the witness.

Mr. Jacobs: I will consent to that.

Q. Tell us what was said. You do not use the words that were used, but the substance of the conversation, you see, Mr. Elliff.

A. He knew I wasn't stable enough to continue in business by myself. [17]

Mr. Shapro: I make the same motion, your Honor.

The Court: I didn't hear the last. Miss Reporter, will you please read the answer?

(Answer read.)

The Court: It may go out. Mr. Elliff, we are required to deal by what one person said and what the other person said by conversations, not from conclusion that you might have. It is for the Court to draw the conclusion after we hear the conversation that was said. So will you try to confine your statements.

Q. (By Mr. Jacobs): Let's have the rest of

(Testimony of George F. Elliff.)

your conversation regarding your ability to take over. What did he say?

A. He said he would have to give it some thought. He talked to me at length about the warehouse which we had set up at that time and that was secured. He spoke of the fact that I had to agree to the release clauses in the contract and that he would get in touch with me later and give it some decision.

Q. (By the Court): Now, release clauses in what contract?

The Witness: On May 1st, the 1st of May, we had set up a warehouse in which he was carrying the warehouse receipts.

Q. (By Mr. Jacobs): Now, was there any exchange of correspondence regarding this warehouse arrangement? A. Yes, sir, there was.

Q. Did you receive any letters, any letter or letters from Mr. Hunter in that regard? [18]

A. I did, yes, sir.

Q. I show you a letter on the letterhead of Twin City Lumber Company, dated May 4, 1953, addressed to Mr. George F. Elliff, and purportedly signed by Twin City Lumber Company by J. W. Hunter, and ask you whether that is the letter that you refer to.

A. This is a program that he laid out in the terms of the contract to warehouse the material in the Pine Supply. That is the letter.

Mr. Jacobs: We offer this in evidence as Trustee's Exhibit 1, if your Honor please.

(Testimony of George F. Elliff.)

The Court: Plaintiff's Exhibit 1. Give it to the Clerk.

(Thereupon the foregoing document was marked Plaintiff's Exhibit 1 and received in evidence.)

Q. (By Mr. Jacobs): Did you ever receive from Mr. Hunter a counter file of a letter addressed to the Douglass Guardian Warehouse Corporation by Mr. Hunter, a carbon copy?

A. Yes, yes I did.

Q. In regard to that same letter, the warehousing arrangement namely?

A. As I recall the letter, yes. It outlined the same thing as in the first letter.

Q. I show you a carbon copy bearing date May 6, 1953, addressed to Douglass Guardian Warehouse Corporation by Twin City Lumber Company, with the signature "J. W. Hunter," [19] a purported signature, J. W. Hunter. Do you recognize the signature at the foot of that letter?

A. Yes, I do.

Q. Whose is it? A. John Hunter's.

Q. And this is the carbon copy that you have referred to as having received from Mr. Hunter?

A. Yes, I received this.

Mr. Jacobs: I will offer this as Trustee's Exhibit 2, your Honor.

The Court: It may be marked Exhibit 2.

(Whereupon the foregoing document was marked as Plaintiff's Exhibit 2 and received in evidence.)

(Testimony of George F. Elliff.)

Q. (By Mr. Jacobs): Now, Mr. Elliff—

The Court: Just a moment, counsel. Will you let me read the letter?

Mr. Jacobs: Oh, I beg your Honor's pardon.

The Court (Reading): All right.

Q. (By Mr. Jacobs): Did you have any discussion with Mr. Hunter regarding this warehousing arrangement prior to the receipt of the letter of May 4th? A. Yes, sir, I did.

Q. Where did that discussion take place?

A. Well, it was over a long period of time by telephone. Finally I made a trip to Los Angeles and talked to him about it. [20]

Q. When was that?

A. It was prior to May 1st, the last part of April, I would say.

Q. And where did the discussion take place in Los Angeles?

A. In his office at Beverly Hills.

Q. Who was there?

A. Myself and hisself.

Q. What was said and by whom regarding this warehousing arrangement on that occasion?

A. Well, we agreed to set it up; that I was to call Mr. Uhrich, and have him come from Douglass Guardian and inventory the stock and trade at the warehouse at that time and to put it into inventory; and we were to bring the warehouse receipts to Los Angeles, or he was to forward them to Los Angeles.

Q. Who suggested this warehousing arrange-

(Testimony of George F. Elliff.)

ment? A. Possibly I did, I presume.

Q. Was anything said in that conversation regarding the occasion for the warehousing arrangement?

A. May I have that again, Mr. Jacobs?

Q. Was anything said on the occasion of this discussion in Los Angeles that you have just referred to regarding the occasion, the purpose, the object, the reason for having a warehousing arrangement?

A. Well, it was a case of protecting Mr. Hunter because we were delinquent in our bills, and also to expand the business somewhat. [21]

Q. Now, who said this?

A. It wasn't a question of saying; he was demanding that we pay up.

Q. He was demanding that you pay up. And in response to this—is this a correct statement—in response to this demand, you offered this warehousing arrangement? A. That's right, sir.

Q. As security for what?

A. For the money we owed him.

Q. Now, what account were you operating under; what sort of an account, at the time that this warehousing arrangement was set up?

A. You mean the name?

Q. Yes. What would you call it?

A. Abbott-Lane Pine Supply, I believe.

Q. Was it an open account? A. Yes.

Mr. Shapro: I object to the question. It calls

(Testimony of George F. Elliff.)

for the opinion and conclusion of the witness, was it an open account.

The Court: Well, I think that is a description the witness can give. By "an open account" you mean it was unsecured?

The Witness: It was an open account.

The Court: What? [22]

The Witness: It was an open account.

The Court: And by an open account you mean an unsecured account?

The Witness: That's right, sir.

Q. (By Mr. Jacobs): Now, after this warehousing—when this arrangement was set up, was there any discussion as to the use of this arrangement and the warehouse receipts that were to be issued under it as security for any other account and the account you were operating at that time?

Mr. Shapro: I object to that question, if your Honor please. It is an attempt to vary a written instrument by parole. That document which is Plaintiff's Exhibit No. 1 is an agreement between the parties, and was accepted by the witness. Any discussions prior to that or understandings will be merged in the written instrument.

The Court: What are you asking for: this discussion prior to the date of this letter, or subsequent to it?

Mr. Jacobs: Subsequent to it, your Honor, at the time when this warehouse arrangement actually went into effect.

Mr. Shapro: If your Honor please, he is asking

(Testimony of George F. Elliff.)

questions with respect to conversations after the written instrument was entered into. We object upon the ground it calls for hearsay and it is an attempt to vary a written instrument by parole.

Mr. Jacobs: It isn't an attempt to vary a [23] written instrument at all. It's an attempt to see if the——

The Court: I think I will permit the discussion. We will find out what it was.

Q. (By Mr. Jacobs): Was anything said about that?

A. Yes. It was openly discussed.

The Court: When did you have any conversation after?

The Witness: It was prior.

The Court: What?

The Witness: It was prior to that, sir.

The Court: It was prior to that?

The Witness: Yes.

Q. (By Mr. Jacobs): Oh. Now, am I correct in understanding that there was no discussion in that regard after these letters were received?

A. It was part of the agreement that we would throw everything that was in the warehouse, whether it came from Twin City or other sources, under warehouse receipts.

The Court: That I don't understand.

The Witness: We had purchased lumber from other firms besides Twin City which we had in the warehouse—I mean, which we had in stock at the Pine Supply Company. But under this warehous-

(Testimony of George F. Elliff.)

ing arrangement, if Mr. Hunter took it over and carried our warehouse receipts, everything purchased from him or anyone else was to go under warehouse receipts.

The Court: Well, who had the warehouse receipts? [24]

The Witness: He did.

The Court: Why wasn't it discussed in the letter?

The Witness: It wasn't discussed in the letter. It was discussed prior to the letters that everything in the warehouse would be under warehouse receipts which he would carry and advance 70 per cent on.

Mr. Shapro: If your Honor please, we move to strike the testimony of the witness with respect to the understanding as to include anything but what was covered by the letter upon the ground that the agreements are merged in the written instrument.

Mr. Jacobs: Well, the behavior of the parties, the actions of the parties subsequent to the receipt of these letters is very illuminating as to what their actual understanding was. It may have rested partly in parole, if your Honor please.

Mr. Shapro: The actions of the parties, yes, but we haven't got to actions, we are talking about conversations, if your Honor please.

Mr. Jacobs: Well, conversations explain what they did.

The Court: Well, this letter shows that there

(Testimony of George F. Elliff.)

was a statement attached thereto. Is there some other part of this letter that we don't have?

Mr. Shapro: Plaintiff's Exhibit 2, your Honor, is the enclosure, Plaintiff's Exhibit 2, May 6th letter to the Guardian Warehouse. [25]

Mr. Jacobs: Despite the difference in dates, I believe counsel's statement is correct.

The Court: In other words, Plaintiff's Exhibit 2, which is dated May 6th, was enclosed with the letter of May 4th?

The Witness: Yes. And I believe there was another copy of this which I returned, signed and returned to Mr. Hunter. Is that correct?

Mr. Shapro: That is right, we have it.

The Court: That is an extra copy, according to that, of the letter of May 4th which you returned, according to the letter?

The Witness: I had it signed and returned.

The Court: Yes. This is a copy of the letter of May 4th. But what I am calling your attention to is the fact that the letter is dated May 4th and you say this letter dated May 6th was enclosed as an enclosure with that letter?

The Witness: I can't honestly say. I know they came in about the same time at the office. But there was quite a bit of material in this letter.

Mr. Jacobs: It does seem that the letter of May 4th was not mailed on the date that it bears and apparently it was held up until this other letter had been prepared, and then a carbon was put in.

(Testimony of George F. Elliff.)

That seems to be the situation, your Honor. I am surmising.

Mr. Shapro: That is our understanding of the facts, as [26] well, your Honor.

Q. (By Mr. Jacobs): I believe counsel is correct.

Now, Mr. Elliff——

Mr. Shapro: May I have a ruling from the Court on the motion to strike, your Honor?

The Court: Well, at the moment, the motion to strike may be denied. This letter itself is not all inclusive of what might have been there. It says, "To confirm our agreement of yesterday, please be advised as follows. We will advance you 70 per cent of our invoice price on all lumber, moldings, plywood and door jambs purchased from us."

Mr. Shapro: Right.

The Court: He doesn't talk about anything else.

Mr. Shapro: That is right. And that is the reason why, your Honor, I am urging that objection, namely, that any conversations that may have taken place between the witness and Mr. Hunter prior to the agreement in question, which is the document dated May 4th, 1953, are merged and would be merged as a matter of law in the written instrument. And as the witness has told your Honor, we have the copy of this May 4th letter signed by the witness. It was returned to us signed by him. So it has become, in effect, an agreement.

Mr. Jacobs: It isn't an all inclusive agreement. It doesn't purport to be such. And if there was

(Testimony of George F. Elliff.)

another understanding collateral to it, which agreement is entirely [27] consistent, that certainly is competent to show that collateral agreement.

Now, the witness' testimony seems to be that there was further understanding, although Mr. Hunter neglected to mention it in his letter, to the effect that all of the merchandise belonged—all of the stock in trade of Abbott-Lane or Pine Supply Company, whichever it was—it was all a partnership—should be put under this warehousing agreement; and if that is the case, I think the Court ought to know it.

The Court: If there was such an agreement, I am willing to hear about it. But I would like to find out when it was and where it was and what they are trying it for, because we haven't got it.

Q. (By Mr. Jacobs): We will try and supply it.

Mr. Elliff, what conversation, and I mean on what occasion, did this conversation occur that I related to the deposit under the warehouse agreement of the entire stock in trade as you have mentioned?

A. It was prior to the writing of this letter because at the writing of this letter all stock in trade was in the warehouse as of Friday, which Mr. Hunter had deposited the warehouse receipts.

Q. The entire stock in trade? A. Right.

Q. What did that include in reference to the sources of it? [28]

(Testimony of George F. Elliff.)

A. It included everything that was possessed by Pine Supply Company.

Q. Everything you had? A. Yes.

The Court: When did that go in the warehouse?

The Witness: Prior to the writing of this letter.

The Court: When, how long prior?

The Witness: I was in Los Angeles. He speaks of yesterday; that would have been Sunday, May 3rd. So it was May 1st, I presume. It was on Friday, May 1st.

The Court: What happened on Friday, May 1st?

The Witness: The Douglass Guardian Warehouse people inventoried the stock in trade of Pine Supply and wrote out warehouse receipts which Mr. Hodes and I endorsed over to Douglass Guardian Warehouse Corporation.

The Court: The actual warehouse receipts were given to Twin City on May 1st?

The Witness: To Douglass Guardian on May 1st.

The Court: I lost you there. I thought you said they were given to Twin City.

The Witness: In turn, he was in turn to transfer them to Twin City.

The Court: For how long a time had your stock of merchandise been in any warehouse where there was a receipt issued? [29]

The Witness: Concerning this letter?

The Court: What?

The Witness: Back to concerning this letter?

The Court: The letter wasn't written on May 1st. I am asking you——

(Testimony of George F. Elliff.)

The Witness: May 1st, three days it had been warehouse receipts, three days.

The Court: How did it get in any warehouse? When was it delivered there and by whom?

The Witness: It was there already. I mean a warehouse doesn't have to be there. It could be out in the field some place.

Mr. Shapro: May I make an observation? A field—what is called a field warehouse was set up in Mr. Elliff's premises by the Douglass Guardian Warehouse on or about May 1st, 1953. A field warehouse, if I may suggest—your Honor, are you familiar with it?

The Court: No, I am not.

Mr. Shapro: A field warehouse is this: It is used by warehouse—by public warehouse companies under the Warehouse Receipts Act of California to designate and set apart in the premises of the original owner merchandise property segregated into the possession of a warehouse company, which under the statute may then issue a warehouse receipt.

What they do physically, they take a man's premises, such [30] as this, they fence it off, they put up a wire fence with a lock, they put a warehouseman in charge, and everything that goes inside there is covered by warehouse receipts and is in possession of the warehouse company.

Everything that doesn't go in, is in the possession of the operator of the business. That is what is commonly called a field warehouse.

(Testimony of George F. Elliff.)

The Court: That is your understanding?

Mr. Shapro: That is right, yes, your Honor.

The Court: Is that your understanding of it?

The Witness: Yes, sir.

Q. (By the Court): So that on May 1st there was an arrangement made whereby the stock in trade of your company was placed within a separate enclosure under the custody of Douglass Guardian?

The Witness: That is right, sir.

The Court: And that was all the stock and merchandise that you then had?

The Witness: That's right, sir.

Q. (By Mr. Jacobs): And just roughly, Mr. Elliff, what percentage of that merchandise had been purchased from other sources than Douglass Guardian Warehouse?

Mr. Shapro: You don't mean that; you mean Twin City.

Q. (By Mr. Jacobs): I mean other than Twin City that you——

A. Oh, I would say roughly in the neighborhood of half [31] had been purchased outside of Twin City.

Q. All right, sir.

A. Dollarwise, not in volume, but dollarwise.

Q. Dollarwise. Now, did you receive any correspondence from the old firm regarding the state of your account with the old firm, that is, the state of the Pine Supply Company account with the old firm subsequent to these letters?

(Testimony of George F. Elliff.)

A. It is possible. I don't remember offhand.

The Court: We will take a short recess.

(Recess.)

Q. (By Mr. Jacobs): Mr. Elliff, you have testified, as I understand it, that you did receive some, or that you may have received subsequent letters from the old firm after the letters that have gone into evidence already? A. I did, yes.

Q. Establishing this arrangement. I show you a letter on the letterhead of Twin City Lumber Company, dated May 15th, 1953, signed by Twin City Lumber Company by J. W. Hunter, and ask you whether you received that letter.

A. Yes, sir, I did.

Q. And is that Mr. Hunter's signature at the foot of the letter?

Mr. Shapro: Your Honor, I have examined all of the letters that counsel has. They were all received by him in the ordinary course. They all are authentic letters from [32] the defendant.

Mr. Jacobs: That saves a great deal of time. I thank you, counsel.

The purpose of offering that group of letters, your Honor, is to show that Twin City Lumber Company was very much dissatisfied with the status of the account. The letters — the letter of May 15th——

The Court: 13th?

Mr. Jacobs: 15th, sir; that was just prior to the dissolution; the letter of May 28th, that was just at the time of the dissolution or immediately

(Testimony of George F. Elliff.)

after it. June 5th, June 17th, another of June 17th, and a letter of September 21, 1953, all of 1953, all signed by Mr. Hunter.

They speak of themselves, and I offer them in as a group.

The Court: The six letters may be admitted and marked.

(Whereupon the foregoing six letters was marked Plaintiff's Exhibit No. 3 and received in evidence.)

Mr. Jacobs: Let me say, of course, the red underscoring in those letters is mine, your Honor. I did not at the time have any idea that I was going to have to introduce them in evidence.

Q. Mr. Elliff, was Mr. Hunter the only person with whom you dealt in doing business with the old firm subsequent to the dissolution of the partnership? A. No, sir. [33]

Q. Who else did you deal with in dealing with the old firm, what other individuals?

A. Mr. Howard Collins and Mr. William Ramsey.

Q. What, if you know, was their position in it?

A. I was given to understand that they were partners.

Q. I see. Now, did you have any conversations with Mr. Hunter or either of the two gentlemen you have just mentioned, subsequent to the dissolution of the partnership, regarding your financial affairs? A. Only Mr. Hunter, I would say.

Q. Only Mr. Hunter?

(Testimony of George F. Elliff.)

A. Only Mr. Hunter.

Q. What conversation did you have with him subsequent to May 15th?

A. It was the time I proposed the warehouse, the Douglass Guardian.

Q. No. I mean subsequent to that conversation, Mr. Elliff, did you have any with him after that?

A. After that?

Q. Yes. A. Yes, sir.

Q. And when did that take place?

A. I am relying on my memory here. I believe it was in August of '53.

Q. And where did that take place? [34]

A. At Twin City Lumber Company's office on Market Street here in San Francisco.

Q. Now, who was present there?

A. Mr. Hunter, I believe Mr. Ramsey was out of the office at that time, and Mr. Collins,—I am not certain—and Mr. Joel Baum.

Q. What was Mr. Baum's relation to you, Mr. Elliff?

A. He is a certified public accountant and was making an audit of the dissolution and of Pine Supply as it stood at that time.

Q. Was he your auditor? A. Yes, sir.

Q. Of your business, I mean? A. Yes, sir.

Q. And what was said and by whom on that occasion regarding your financial condition?

A. We had—I had gone to Mr. Hunter to request him to work out a more workable agreement than what we were working under, and more or

(Testimony of George F. Elliff.)

less relate to him the circumstances of the company at that time. His answer was that he would think it over. He was on his way to Canada, and think it over and give him an answer at a later date on his return.

The Court: Mr. Elliff, now please give us what was said. Substantially, what did you tell him about your financial condition, if you told him anything?

The Witness: I told him it wasn't good, which he was quite aware of.

The Court: What did you tell him, please, about the financial condition? That is the question now.

The Witness: I answered it before by saying that I told him about the circumstances of the company.

The Court: That doesn't mean anything to me. I want to find out what you told him.

The Witness: Well, I was complaining about the interest rates that we were paying and asked him to assist us, which he answered he would think over. I turned more or less the facts of the case——

The Court: What?

The Witness: Of finances, the assets, the liabilities, the delinquent payments——

The Court: What did you tell him, please, Mr. Elliff? That is what I am trying to find out.

Q. (By Mr. Jacobs): What did you tell him the assets were, what did you tell him the liabilities were?

A. I can't recall that because Mr. Baum had the figures on it.

(Testimony of George F. Elliff.)

Q. Did Mr. Baum present this information to Mr. Hunter on that occasion?

A. Verbally, yes.

Q. Verbally. Now, how was this information compiled, Mr. Elliff? [36] Did you assist in compiling it? A. Yes, sir.

Q. And state whether or not it was—as to the correctness of the information, what can you tell us?

A. It was as accurate as we could actually place it.

Q. I see. Now——

The Court: Do you expect to develop what was this by another witness?

Mr. Jacobs: Yes, your Honor. I am just laying the foundation of it.

The Court: I want to call your attention to the fact that I haven't got it from the witness.

Mr. Jacobs: I understand that, your Honor.

Q. Can you give it to us, Mr. Elliff?

A. Well, we discussed the accounts receivable in dollars and cents. What they were, I don't recall. Somewhere around \$17,000.00, I believe, at that time. We discussed the money that we owed Twin City on releases that were delinquent. We discussed the factory setup wherein I could sell the paper and in turn convert it to cash, which would facilitate me paying Mr. Hunter that much faster, which he was very definitely interested in, because he couldn't see how he could survive, and he stated so, without it, because I couldn't afford to carry

(Testimony of George F. Elliff.)

the accounts receivable. I didn't have that kind of capital. It was of great concern, both to myself [37] and Mr. Hunter. It was discussed at great length at that time.

Q. And was any mention made of what the net worth of the business was?

A. I believe Mr. Hunter requested that and Mr. Baum and I both agreed that we would give it to him in writing at the time he returned from Canada.

Q. Did you ever do that?

A. I believe the end came too fast for us to ever get a complete report to him.

Q. In other words, you did not do it, is that right?

A. I don't recall ever giving it to him in writing, no, sir.

Q. Now, do you know at the present time what the total amount in money of the assets—of the value of the assets of that business were at that time?

Mr. Shapro: May I have the question read, if your Honor please?

The Court: Read the question.

(Question read by reporter.)

Mr. Shapro: I object to that question upon the ground it calls for the opinion and conclusion of the witness, your Honor. We haven't found out what the assets were yet.

The Court: Do you mean the book value, counsel?

(Testimony of George F. Elliff.)

Mr. Jacobs: Yes, your Honor, that is exactly what I mean.

The Court: Or value, his purchase price, is that what you mean? [38]

Mr. Jacobs: Yes. I think that would be the book value of it.

Q. You kept your books on a purchase basis, didn't you? A. We did.

Q. Do you know what the total assets added up to?

The Court: The objection may be overruled to his question. Go ahead.

A. It hasn't improved any since the time the first audit was made, as I recall.

Q. (By Mr. Jacobs): Well, that isn't exactly the question. Do you know what the amount was?

A. No, sir, I don't.

Q. Can you give it to us in round figures, approximately?

A. I would be something if I did.

Q. I see. All right. We'll have to get it from Mr. Baum, then.

Now, Mr. Hunter subsequently returned from Canada, I think you said, and did you have a conference with him after his return?

A. Only a letter, I believe.

Q. A letter from him?

A. From him, yes, sir.

Mr. Jacobs: I think that may be one of the letters that I have just introduced, your Honor.

(Testimony of George F. Elliff.)

The Court: I have not had an opportunity to read those.

Mr. Jacobs: Of course not.

Q. Do you recall the approximate date of the letter that you have just referred to?

A. It would have to be in the latter part of August or the first of September.

Q. I will show you this letter which is a part of Plaintiff's Exhibit 3 and dated September 21, 1953, and ask you if that is the letter that we have just referred to?

A. May I have time to read it?

The Court: Yes.

The Witness: Yes, sir, I believe this is the letter.

Q. (By Mr. Jacobs): In other words, the letter that you have referred to is a letter included in Plaintiff's Exhibit 3 which was dated September 21st, is that right?

A. That is the letter, that is right.

Mr. Jacobs: That is the last of that group of letters, your Honor. It speaks for itself.

The Court: Very well.

Q. (By Mr. Jacobs): Mr. Elliff, I direct your attention to the time about the end of August, 1953, and I ask you to tell us what was the basis of your dealings with the Twin City Company, I mean the old firm, at that time; what accounts did you carry with them?

The Court: What accounts? [40]

Q. (By Mr. Jacobs): What account or accounts?

(Testimony of George F. Elliff.)

Mr. Shapro: I object to that question on the ground it calls for the opinion and conclusion of the witness.

The Court: I don't quite understand the witness. "What accounts did you carry with Twin City?"

Mr. Jacobs: Yes, he had an open account.

Q. Did you have any other, that is what I am driving at? A. Warehouse account.

Q. You had a warehouse account and an open account?

A. Correct. Well, they were actually basically one and the same.

Q. I see. Now, at that time, up to that point, how had you made your payments to Twin City Company, in what form?

A. I would order lumber. They would ship lumber. They would take the total amounts of that invoice and credit me with 70 per cent. I, in turn, had 30 days to pay them the 30 per cent.

Q. And how did you make the payment when payment was made? A. By check.

Q. By check. Drawn on the Pine Supply Company account? A. Yes, sir.

Q. (By the Court): What happened to the 70 per cent?

A. Then as we would release the materials from the warehouses, for shipment to customers, when we reached the total of \$2,000.00 released on purchase price, not on sales price, [41] I was to forward the \$2,000.00, or whatever the weekly release

(Testimony of George F. Elliff.)

money would be—it would be one or two—to Twin City Company.

Mr. Shapro: Your Honor, that is not responsive to your Honor's question which was: What happened to the 70 per cent?

The Witness: It became the property of Twin City Company.

Q. (By the Court): What became the property of Twin City? A. The 70 per cent.

The Court: Well——

The Witness: But how I repaid it: I thought that is what you wanted to know.

The Court: Let's say there is an invoice of \$1,000.00, you paid them \$300.00 on that invoice?

The Witness: That's right.

The Court: And you owed them \$700.00?

The Witness: Right, sir.

The Court: Well, now, how was that \$700.00 charged against you? Were you billed for it and you paid it whenever you resold the lumber out of the warehouse; is that what you mean?

The Witness: That is exactly what I mean, sir. It was invoiced at 30 per cent at the time of the invoice that they had a copy of. It would be very easy to explain. At the top of the invoice it would explain that 30 per cent was due in 30 days and 70 per cent was to be written on warehouse receipts. [42]

The Court: And it was to be paid upon release from the warehouse when you sold the customer, is that what you mean?

(Testimony of George F. Elliff.)

The Witness: That is exactly right.

The Court: And you made them full—or, that is, if you took \$2,000.00 out, you paid \$2,000.00?

The Witness: Right, sir.

Mr. Jacobs: This will be much clearer when we get these exhibits in evidence, your Honor. But at the present time, to clarify the witness' testimony, I will show him some photostats of specimen invoices.

Q. I am showing you, Mr. Elliff, a photostat of what purports to be an invoice of Twin City Lumber Company, by purporting to be sold to Pine Supply Company, Ponderosa pine rough. Is that a fair specimen of the invoices which you have just referred to? A. That is a fair specimen.

Q. And did they all come to you with the notations written in, "30 per cent cash advance 10 days after receipt papers, balance in accordance with warehousing agreement"?

A. That is right, sir.

Q. Is that right? A. They did.

Mr. Jacobs: We will ask that this be marked for identification at the present time, your Honor. I am going [43] to offer it as a whole.

The Court: It may be admitted.

(Whereupon the foregoing document was marked Plaintiff's Exhibit No. 4 for identification.)

Q. (By Mr. Jacobs): Were all of the checks that you have mentioned paid on presentation?

A. No.

(Testimony of George F. Elliff.)

The Court: Read that question. I didn't hear it.

(Question read.)

Q. (By Mr. Jacobs): Referring to the period during which the Pine Supply Company was doing business under that name down to say the 6th of October, 1953, how many of the checks, or rather what was the amount, if you can tell us, of the checks that you gave the old firm that were not paid on presentation?

A. Will round figures be satisfactory?

Q. Yes. A. Roughly \$10,000.00.

Q. What became of those checks?

A. After the signing of the trustee agreement, they were to return them, but I have never seen them since.

Q. Now, you speak of the trustee agreement. Did you have a conference with Mr. Ramsey in the office of the Pine Supply Company at San Jose at or about the end of August, 1953?

A. September, I believe, sir; yes, I did.

Q. About early in September. Can you give us [44] the approximate date?

A. It was two weeks prior to the signing of the trustee agreement. That is as near as I can give you.

Q. I see. And who was present on that occasion?

A. Mr. Ramsey, myself and Mr. Baum, I believe.

Q. And on that occasion, what was said and by whom regarding the status of your account with the old firm?

(Testimony of George F. Elliff.)

A. Mr. Ramsey had been sent as an agent of Twin City Company to examine the books and the accounts receivable and the inventory of Pine Supply.

Q. Did he say so?

A. Yes, I believe he did.

Q. And did he do so? A. He did.

Q. Now, were you and Mr. Baum present when he did so?

A. Absolutely. We assisted him.

Q. What did he actually examine of your records on that occasion?

A. Well, we opened it entirely to him. I mean all the accounts receivable ledger, accounts payable, and general status of the financial situation of the Pine Supply Company as a whole.

Q. Did your accounts payable report the names of all of your creditors?

A. Yes. It was very accurate. [45]

Q. That is of the creditors having to do with the business? A. Yes.

Q. Now, did you at that time have other creditors who were not involved in that business; I mean, who weren't creditors because of their business dealings with you under the name of Pine Supply Company?

A. I personally had creditors, yes.

Q. That is what I mean. Who would that be?

Mr. Shapro: I object, if your Honor please, no proper foundation has been laid, namely, that the declaration of these other creditors was made in

(Testimony of George F. Elliff.)

the presence of the defendant who at that time was represented by Mr. Ramsey.

Mr. Jacobs: I don't understand——

The Court: The question of insolvency or not, doesn't the question of all his creditors come in?

Mr. Shapro: I understood that the purpose of his question was to show knowledge of insolvency.

Mr. Jacobs: We are showing knowledge of a part of the information. We have to show that they knew it all.

Mr. Shapro: If it was only for the purpose of showing insolvency, I will withdraw the objection.

Mr. Jacobs: It is for the purpose of showing that, and it is for the purpose of showing that there were creditors at the time of the bankruptcy.

Q. Are these personal creditors that you have referred to? [46]

A. Well, banks——

The Court: What?

A. I had a note at the bank. I was building a house. I had numerous amounts owed by sub-contractors. I owed some money in regards to Coast Range Lumber Company.

The Court: I didn't get that last.

A. Coast Range Lumber Company.

The Court: Who did you owe on that one to?

A. To Charles Lannon.

Q. (By Mr. Jacobs): Is he the man you mentioned before who was present at the conference that you have just referred to in Mr. Hunter's office in Los Angeles?

A. Yes, sir.

Q. How about Mrs. Lannon?

(Testimony of George F. Elliff.)

A. Mrs. Lannon, yes, sir.

Q. What did you owe her in round figures at that time?

A. I couldn't honestly tell you, but it was in excess of, I'd say, of \$12,000.00.

Q. (By the Court): Was that represented by any writing? A. Yes, sir.

Q. Well, what writing?

A. I had signed a note.

Q. You had to sign notes in the amount of \$12,000.00? A. Or better.

Q. (By Mr. Jacobs): Part of that was secured, was it not? [47]

A. At that time, in September?

Q. Yes.

A. Yes, by the property on Mount Hamilton Road.

Q. And was it all secured?

A. The security wouldn't warrant the amount.

Q. You mean that the property wasn't sufficient to secure it all? A. No.

Q. Now, did you have any conversation with Mr. Ramsey at that time regarding what action, if any, the old firm was going to take?

A. Yes, I did.

Q. Give us the substance of that conversation.

A. Well, it went on for a week, Mr. Jacobs, these conversations. Finally I was told to lock the warehouse.

Q. Who told you that? A. By Mr. Ramsey.

Q. Well, give us the substance of the conversa-

(Testimony of George F. Elliff.)

tion that you had with Mr. Ramsey on that occasion.

Mr. Shapro: Which occasion, at the meeting in his office?

Q. (By Mr. Jacobs): Let us say in the course of these daily conversations extending over a period of a week, can you distinguish between them?

A. That particular one I can, because it was pretty disturbing, that is, the final analysis of everything we [48] discussed during the week. And he told me to lock the warehouse and there was a question of some checks they were holding. And we went to the bank, I believe, on that particular occasion and it was there that I offered him the keys to the warehouse.

Q. What bank are you referring to?

A. The Hester Branch, Bank of America.

Q. Did anybody go with you?

A. Mr. Baum was present at that time.

Q. I see. Was there any discussion on that occasion or any of these previous occasions that you have just referred to regarding the new arrangement with the Twin City Company?

A. I stated to Mr. Ramsey that I could not continue to operate under the domination of Twin City. Something would have to be done.

Q. And what was his reply?

A. He said that they didn't want—I told him that as far as I was concerned, that any——

The Court: I can't understand you. Keep your voice up.

(Testimony of George F. Elliff.)

A. I told him that as far as I was concerned, that Twin City Company were in the wholesaling——

Q. (By Mr. Jacobs): Again I ask you what was his reply?

A. He stated that they weren't interested in being in the wholesale—in that particular phase, in the wholesale lumber, but not in small quantities.

Q. Did he make any suggestion to you?

A. No, not on that occasion.

Q. Was there any discussion about a new arrangement on that, or any occasion that you have referred to already in the course of these conversations?

A. Not at that—not at that particular meeting in front of the bank, no.

The Court: Let's take a recess at this time.

May I ask if counsel has any idea as to how long this case will take?

Mr. Jacobs: I have estimated, your Honor, three days. I still think the estimate is pretty good.

The Court: Three days. What do you think?

Mr. Shapro: In view of the fact that we haven't completed the testimony of Mr. Elliff, I am forced to agree with counsel. It is a blow to my optimism, your Honor. I had hoped it could be disposed of in two.

The Court: All right.

Mr. Jacobs: I will guarantee speed as far as we can give it to your Honor without leaving out the crux of our case.

The Court: You can't rely on a guarantee of that kind very much.

Mr. Jacobs: In other words, we will do our best.

The Court: All right. Two o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m. of this day.) [50]

Afternoon Session—2:00 O'Clock P.M.

Mr. Jacobs: If your Honor please, there are three attorneys here and they all have full calendars for tomorrow. If the other parties have no objection—I understand opposing counsel has none—I would like to call them out of order so that they can get away.

The Court: Very well.

HENRY ROBIDOUX

called as a witness on behalf of the plaintiff, sworn.

Direct Examination

The Court: State your name, please.

The Witness: My name is Henry Robidoux.

Q. (By Mr. Jacobs): And you are a member of the State Bar of California? A. I am.

Q. And were such throughout October of 1953?

A. I was.

Q. Were you employed during that month or thereabouts as attorney for Mrs. Pearl K. Lannin?

A. I was.

Q. In what connection?

A. I was employed by Mrs. Lannin to examine some papers and advise her in connection with a

(Testimony of Henry Robidoux.)

matter of her signing or guaranteeing a promissory note that was to be signed by her [51] son-in-law, Mr. Elliff.

Q. And to whom was the note made payable, do you know?

A. Twin City Lumber Company, as I recall.

Q. And were there any other documents involved in that transaction, as you now recall?

A. Yes. There was a promissory note that Elliff and his wife were to sign and in which Mrs. Lannin, as I recall, was to guarantee. There was an agreement, a trustee agreement, to accompany that. And then there were some warehouse receipts to be assigned to Mrs. Lannin.

Q. Now, what were you employed to do precisely?

A. To examine the note, to examine the trust agreement, and to advise Mrs. Lannin regarding her position in signing this promissory note.

Q. And when were you so employed, Mr. Robidoux?

A. Well, I don't recall the exact date. My best recollection is that it was just shortly a day or two, or maybe three days before the date that the note would bear or the trustee agreement. As I recall, the period of the employment before the executing of the papers was just a short time, two or three days, only.

Q. Now, did you give her the advice that you were employed to give?

A. I gave her advice, yes.

(Testimony of Henry Robidoux.)

Q. And preliminary to giving her the advice, did you examine the documents? [52]

A. I did.

Q. And what other, if any, investigation did you make?

A. Mr. Louis Pasquinelli, an attorney in San Jose, represented Mr. Elliff. Mr. Elliff had an accountant, I believe his name was Baum, I believe it was. I knew Mr. Pasquinelli very well. I inquired of him as to what assets the Pine Lumber Company—that was the name that Mr. Elliff was doing business under, as I recall.

Q. Pine Supply Company?

A. Pine Supply Company, as to what assets Pine Supply Company had.

Q. And did you inquire also regarding liabilities? A. I did.

Q. And what information did you receive?

Mr. Shapro: Just a moment. I object to that question, if your Honor please, on the ground it calls for hearsay, no proper foundation has been laid showing that the defendant, Twin City Lumber Company, was in any way present or represented in connection with this conference.

Mr. Jacobs: Our theory in that regard, your Honor, is simply this: that if these people—of course, we have not made the connecting proof and we will make it—our contention is that this entire transaction was concerted between Twin City Lumber Company and the bankrupt. And that what was said [53] by the bankrupt's attorney consequently

(Testimony of Henry Robidoux.)

was as much a part of this alleged fraud as what was said by any representative of the Twin City Company itself. If we are successful in showing that they did concert this plan, then I respectfully submit that the information that he received from Twin City Company—from the bankrupt's attorney—is material to this cause of action.

Mr. Shapro: Your Honor, but he is jumping the gun. Our objection is based upon the ground, if your Honor please, that no proper foundation has been laid. Now, was this witness called upon to testify what the attorney for Mr. Elliff told him not in the presence of any representative of Twin City Lumber Company?

Mr. Jacobs: I will have to admit that we have not had the opportunity to lay the foundation because we are calling this witness out of order. I would ask this: that the testimony be received subject to our connecting it up in that manner.

Mr. Shapro: Your Honor, this is such a vital part of an accusation, the charge of fraud in this case, that I respectfully submit that we are entitled to have the proof in an *orderly with* respect to at least the foundation.

Now, it is possible, perhaps, that the foundation, if any, may be laid by others than that witness—and he *may the* last of the three lawyers instead of the first, I don't know—but when I agreed that these witnesses be called out of order, [54] I did not waive any right to require orderly proof of the evidence from the witness himself.

(Testimony of Henry Robidoux.)

Mr. Jacobs: We don't dispute counsel's statement that the proper foundation has not been laid, your Honor. I do think that it may be appropriate to take the witness' testimony and then—there is no jury here—and the Court will naturally disregard it if the Court finds it incompetent, or it can be stricken out. We make no objection unless the proper foundation has been laid. We think we have the evidence with which to lay it. I did want to avoid the necessity of calling Mr. Robidoux. I had expected Mr. Elliff——

The Court: I would prefer to have it in the proper order. But, by reason of the fact that the counsel is here from San Jose, I would like to consult his convenience. Also, it might be that such testimony as might be later found to be proper, if it was connected up, might be received subject to a motion to strike. I will receive it on that basis.

Mr. Jacobs: Thank you, sir.

Q. Now, may we have your answer to that question, Mr. Robidoux, what information was given to you when you called on Mr. Pasquinelli? What information did Mr. Pasquinelli give you in regard to the condition that is concerned?

A. May I refer to some notes that I made at that time?

Q. If you need to prompt your memory.

A. The information I received at that time was that the [55] Pine Supply Company had accounts receivable in the neighborhood of \$24,798.80.

The Court: Give me that figure again.

(Testimony of Henry Robidoux.)

A. \$24,798.80. I was also given the information that the inventory amounted to around \$24,492.00. That was figured at cost. And I was given to understand that the accounts payable amounted to around \$11,000.00. And then taking into consideration this \$28,000.00 note, it would fix the liabilities at around \$39,000.00.

Q. (By Mr. Jacobs): I think you have already said that you did examine the trust agreement as well as the note before you gave your advice to your client?

A. I examined the trust agreement, as I remember. As I remember, the trust agreement was prepared in Mr. Pasquinelli's office and I examined it in his office. It was late in the afternoon and it was being prepared. I went to his office and examined it there.

Q. What was subsequently done with it, if you know?

A. I examined the trust agreement and as I recall, I went—I took the trust agreement and the note to Mrs. Lannin's residence late that afternoon, which was evening, really, around 5:00 o'clock or so. There I went over the documents with her and as I recall she signed them there.

Q. Have you told us the entire investigation that you made?

A. Well, I knew little or nothing about warehouse receipts. [56] I made some inquiries about warehouse receipts and how they were handled. I think that is about all the investigation that I made.

(Testimony of Henry Robidoux.)

I discussed the matter with Mr. Elliff. I believe I also discussed the matter with the accountant also there at Pasquinelli's office.

Q. Other than what you have told us, did you get any information from them?

A. Other than from them?

Q. Yes, other than what you have already told us.

A. No.

Mr. Jacobs: Take the witness.

Cross Examination

Q. (By Mr. Shapro): Mr. Robidoux, in addition to the services that you have testified to that you rendered for Mrs. Lannin, you also advised her in connection with certain payments that were made on this \$28,000.00 note, did you not?

A. After the discussion of the note, yes.

Q. And it is true, isn't it, Mr. Robidoux, that Twin City Lumber Company was not a party to the trust agreement that you have referred to as having been examined by you?

Mr. Jacobs: This document speaks for itself, if your Honor please. That is the best evidence.

The Court: I think it is proper examination at this time.

The Witness: I haven't seen the trust agreement in a long, long while. But as I recall, Twin City was not a party [57] to it, as I recall.

Q. (By Mr. Shapro): Do you recall, Mr. Robidoux, whether or not warehouse receipts on certain lumber were issued to and delivered to Mrs. Lannin

(Testimony of Henry Robidoux.)

at or shortly after the execution by her of the guarantee on the note and her execution of the trust agreement?

A. The warehouse receipts, as I recall, were delivered, yes.

Q. Mr. Robidoux, I show you what purports to be a letter on your letterhead dated August 25, 1954, and ask you whether or not you wrote that letter to Mr. Hunter at an address he named there?

Mr. Jacobs: If your Honor please, unless we be remiss in making our objection, this letter which I have just examined is not within the scope of the direct examination. I presume the witness knows the answers to these questions, but I want the record kept clear that this is not within the scope of the direct examination. I am objecting to it on that ground.

Mr. Shapro: I think the only way to do this is to examine the document.

Mr. Jacobs: I believe that is true.

Mr. Shapro: His Honor might just as well look at both of them, then.

The Witness: I did.

The Court: Likewise, the first two letters, the one August 25th, 1954, and one August 26th, 1954, did you write both [58] letters?

The Witness: I didn't see the second letter, Judge, but it's on my letterhead, it's my signature.

Mr. Jacobs: Your Honor will see the force of my objection. It has nothing to do with this case and I didn't want it to be part of the trustee case.

(Testimony of Henry Robidoux.)

The Witness: Yes, I wrote this letter dated August 26th also.

Mr. Shapro: Your Honor, the relevancy of those letters, if I may address the Court at this time at this particular point, the second question I asked the witness was: whether or not he gave Mrs. Lannin advice other than that to which he testified on direct examination. That question was answered in the affirmative. There is a charge in both the cross-complaint and in the complaint that Mrs. Lannin was ignorant of the situation of the bankruptcy until after the bankruptcy.

Both of those letters, if your Honor will note, were written and indicate payments made by her after bankruptcy. That is the purpose of the evidence.

The Court: Well, I take it that it is not proper cross-examination at this time, but neither is the testimony at this time. We were admitting it in order to consult the convenience of Mr. Robidoux. So I think within the discretion of the Court I will admit these letters at this time even though they are out of order. They may be introduced as one Exhibit, as defendant's Exhibit A. [59]

(Thereupon the foregoing documents were introduced as Defendant's Exhibit A.)

Mr. Shapro: I have no further questions.

Redirect Examination

Mr. Robert Jacobs: In order to save time, your

(Testimony of Henry Robidoux.)

Honor, I would like to ask the witness some questions as the witness of Pearl K. Lannin.

Q. Mr. Robidoux, you testified that there was a short time after Mrs. Lannin asked your advice that these trust agreements and note were signed, is that correct? A. That is right.

Q. And to the best of your recollection, how much time had elapsed?

A. I would say it would be a matter of two or three days.

Q. And can you tell the Court why it was only two or three days after she consulted you that these papers were signed.

Mr. Shapro: To which question, if your Honor please, we object upon the ground it is incompetent, irrelevant and immaterial. In other words, we can't see any materiality of the question of why Mr. Robidoux had to give advice within three days instead of, say, thirty days.

Mr. Robert Jacobs: The question is because there is an allegation here of fraud. One of the parts of this allegation we believe is proved by the fact that all this transaction had to take place within a very short time; that it was at the [60] request of the defendant Twin City Lumber Company that this matter had to be taken care of in a very short time. My question opens up a lot of doors.

The Court: If you have some information he got from some source ask him about it.

Mr. Jacobs: You testified that you had conversa-

(Testimony of Henry Robidoux.)

tions with the attorney for George Elliff, the bankrupt, is that correct?

The Witness: That's correct.

Q. (By Mr. Jacobs): And in those conversations was there any discussion of any need for the fact that these things be done in a great hurry?

Mr. Shapro: To which question, if your Honor please, we object. Since this is the witness of Mrs. Lannin, we object upon the ground it is leading and suggestive and also incompetent, irrelevant and immaterial.

The Court: I am going to admit it subject to a motion to strike. We admitted part of the conversation that we received from this same attorney before. Go ahead. What were you told about—were you told anything about the time element?

The Witness: I was told.

The Court: Will you answer that yes or no.

The Witness: Yes, I was.

The Court: What were you told?

The Witness: By this attorney I was told the holder of [61] the warehouse receipts, Twin City Lumber Company, to whom Elliff owed money, was insisting that Elliff take care of his obligations. And it was a matter of time, it had to be done right away or they were going to take some action in the matter, as I understood. And it was a case of Mrs. Lannin coming to the rescue of her son-in-law.

Q. (By Mr. Robert Jacobs): Did you have a telephone conversation with the attorney for the

(Testimony of Henry Robidoux.)

bankrupt on one of the days in which this matter was being discussed?

A. Did I have a telephone conversation with the attorney for the bankrupt?

Q. Yes. A. Yes, I did.

Q. And in those telephone conversations can you tell the Court what was said by you and what was said by the attorney for the plaintiff?

The Court: Hasn't he just given it, isn't that what you are asking?

Mr. Jacobs: Well, your Honor, he is testifying to one conversation, but whether he is testifying to all of them I am trying to find out.

The Court: Some of them may be entirely irrelevant. What are you referring to?

Q. (By Mr. Jacobs): Did you have a telephone conversation with the attorney for the bankrupt immediately prior to your [62] taking the papers which you discussed in your previous testimony out to Mrs. Lannin's house to have her sign them?

A. Yes. I received a telephone call the afternoon that I went down and got the papers. And they were preparing them that afternoon. They said they would have them ready. They couldn't bring them up to me. I said, "All right. To accommodate you since you are in such a hurry I will come down there."

The Court: Went down where?

The Witness: Went down to Mr. Pasquinelli's office on North First Street in the State Building. I went down late in the afternoon and he was just

(Testimony of Henry Robidoux.)

finishing up with the papers. Mr. Elliff was there, the accountant, Mr. Pasquinelli, his secretary. That is where I received the trust agreement, the promissory note.

Mr. Shapro: Your Honor, for the record, may it be understood that the testimony of this witness may be subject to motion to strike?

The Court: That is right.

Mr. Jacobs: You testified, Mr. Robidoux, that you advised Mrs. Lannin as to what to do in this matter. Would you tell the Court what that advice was?

Mr. Shapro: I object to that, if your Honor please upon the ground that it is self-serving and incompetent and immaterial. Here we have an attorney for a party to this [63] litigation, a cross-complainant and defendant being asked to tell the Court what advice to his client was. We object.

The Court: Well, do you think it is admissible, counsel?

Mr. Jacobs: I will withdraw the question.

That is all.

Mr. Shapro: No questions.

Mr. Huntington Jacobs: That is all. With the permission of the Court I will excuse the witness.

(Witness excused.)

TIMOTHY O'CONNOR

called as a witness by the plaintiff, sworn.

The Court: State your full name please.

The Witness: Timothy O'Connor.

(Testimony of Timothy O'Connor.)

Direct Examination

Q. (By Mr. Huntington Jacobs): Where is your office, Mr. O'Connor?

A. 275 North First Street, San Jose, California.

Q. You are a member of the State Bar, are you not? A. Yes.

Q. And were so in October of 1953? A. Yes.

Q. And did you during the month of October, 1953, have a conference at your office with a Mr. Ramsey and Mr. Elliff and Mr. Baum? A. Yes.

Q. Was Mr. Pasquinelli present?

A. No, he was not.

Q. Where was he, if you know?

A. He was out of town that particular day.

Q. I see. Now——

The Court: Are you associated with Mr. Pasquinelli?

Mr. Jacobs: You were a partner of his at that time, were you not, Mr. O'Connor?

The Witness: No. I have been associated with Mr. Pasquinelli for seven years. We have never been partners.

Q. (By Mr. Jacobs): Just office associates?

A. That's right.

Q. Now what was the subject matter of this conference, what was done?

A. Well, Mr. Elliff came into the office and wanted to see Mr. Pasquinelli. One of the secretaries told him that Mr. Pasquinelli was out. So he asked if he could talk to me about the matter. And he—meaning Elliff—and Mr. Ramsey and Mr. Baum came into my office and asked me if they

(Testimony of Timothy O'Connor.)

could talk to me about this matter, about the preparation of a note and some agreement that they wanted to discuss.

Q. Did they give a name to the agreement that they wanted to discuss?

A. As I understood, it was some trust agreement.

Q. What took place at that conference? [65]

A. Well, they told me between the three of them what they intended to do. The question of the preparation of a note was discussed and the question of this trust agreement. I told Mr. Elliff that I didn't feel that I would be qualified to assist in the preparation or execution of the trust agreement because I didn't know too much about his business affairs.

At that point, it was decided that they would only make out the note and that they would come back the following day to see Mr. Pasquinelli about the trust agreement.

Q. And did you prepare a draft of the note?

A. Yes, I did.

Q. Now did you also make notes of this conference? A. Yes, I did.

Q. I show you two documents stapled together, one of which purports to be a draft, a promissory note, of the form of a promissory note, and the second of which appears to be a notation. Whose handwriting is that?

A. Both the note and the longhand note are my handwriting.

(Testimony of Timothy O'Connor.)

Q. Is that the note, and the longhand notations that you referred to just now? A. Yes.

Mr. Jacobs: For the sake of the record, your Honor, we will offer this as Trustee's Number 5 in evidence.

The Court: The paper may be so marked as Trustee's No. 5. [66]

(Thereupon the foregoing documents were introduced in evidence and marked Trustee's Number 5 in evidence.)

Q. (By Mr. Jacobs): Now then did you subsequently cause your informal draft, which has just been marked Exhibit 5, to be reduced to typewriting? A. Yes, I did.

Q. I show you a photostat—I take it there won't be any objection for failing to produce the original?

Mr. Shapro: No.

Q. (By Mr. Jacobs): Of this installment note in the same amount as this drafted note that has just been introduced in the amount of \$28,000.00, and ask you whether that is the note as reduced to typewriting, to which you have just referred?

A. To the best of my recollection it is. The material at the bottom of it "I guarantee payment of the foregoing obligation," the signature, I believe, was on the back of the longhand note I made. I don't believe it was on the front of the obligation at the time.

Q. It was on the document, however?

A. As I remember it, yes, the longhand notes, that was written on the back.

(Testimony of Timothy O'Connor.)

Q. Well, did you see this note that we are now discussing? Did you see this note after or before it had been signed?

A. To the best of my recollection I never saw the note after the afternoon that these gentlemen were in my office. I had [67] the note prepared and gave it to Mr. Elliff, as I remember it. That is the last time I have seen the note to this date, as far as that goes except the longhand notes.

Mr. Jacobs: We will ask that this be marked Plaintiff's Exhibit 6 for Identification, if your Honor please, and we will authenticate it later.

The Court: Exhibit 6 for identification.

(Thereupon the foregoing photostat was marked Plaintiff's Exhibit 6 for identification.)

Q. (By Mr. Jacobs): Now how long did this conference last?

A. Oh, it was approximately half an hour to forty-five minutes.

Q. You stated that Mr. Ramsey was present?

A. Yes. At least, the gentleman that was introduced to me as Mr. Ramsey, yes.

Q. Did you see the gentleman in the courtroom now?

A. Well, I don't remember him specifically. But they tell me at least I have found out since I came in the courtroom—that the gentleman in the brown suit is Mr. Ramsey.

Q. And did Mr. Ramsey take part in the discussion? A. Yes, he did.

Q. What part did he take in it?

(Testimony of Timothy O'Connor.)

A. Well, Mr. Ramsey, as you will note on the longhand notes on the yellow sheet, there was first a set up of payment which wasn't agreeable to Mr. Ramsey. He decided how the [68] payments were going to be. The original schedule of payments was changed to one suggested by Mr. Ramsey. That is the schedule of payments that is at the bottom of the yellow sheet. That was incorporated in the note.

Q. You mentioned the fact that at that conference this trust agreement was also discussed?

A. Yes.

Q. Did Mr. Ramsey take part in the discussion regarding the trust agreement? A. Yes.

Q. What part did he take in the discussion of that subject?

A. Well, as I remember and recollect the entire transaction Mr. Elliff introduced me to Mr. Ramsey and Mr. Ramsey was the man that carried the ball, so to speak, from then on. He was the one who made the decisions as to what the payments were going to be and what the provisions of the trust agreement were going to be and the rest of it.

And, as I say, I didn't know enough about Mr. Elliff's financial matters to do anything about the agreement. So that I made the note, the note was taken out of the office and that is all I know about it.

Q. I see. And you had no subsequent connection with the transaction? A. No, I did not.

Mr. Jacobs: Take the witness. [69]

(Testimony of Timothy O'Connor.)

Cross Examination

Mr. Shapro: May I have Exhibit 5, please?

Q. Mr. O'Connor, referring your attention to the yellow sheet which is part of Plaintiff's Exhibit Number 5, does that represent all of the notes that you took at this conference in your office that afternoon? A. Yes.

Q. What if any notations does the yellow sheet, Exhibit 5, contain with respect to the provisions of the trust agreement?

A. The only reference that it makes to it is at the top of the yellow sheet, the word agreement is written, Pine Supply Company, Twin City Lumber Company, and then below that is the note George Elliff, Audrey May Elliff, his wife, and Pearl K. Lannin, his guarantor. Under that is the original payment schedule that was to be used.

But as I have already testified, it was changed at the request of Mr. Ramsey.

Q. What provisions as to the trust agreement did Mr. Ramsey according to your testimony, specify?

A. May I see it? Down at the bottom of the yellow sheet there is some question about warehouse receipts to be turned over and so forth to Mrs. Lannin.

And as I said before on the trust agreement the terms of that agreement were discussed by Mr. Ramsey and Mr. Elliff also. But as I have already testified, I told them that I [70] didn't know enough about it to enter into or even commence the prepa-

(Testimony of Timothy O'Connor.)

ration of that agreement and that they would have to return the next day to see Mr. Pasquinelli.

Q. I understand your testimony, sir, but what I am trying to find out is what discussion or what items in the discussion of the trust agreement did Mr. Ramsey contribute?

A. What specific provisions?

Q. Yes.

A. He discussed many provisions and I told him, as I have already said, that I didn't feel qualified because of my lack of knowledge of Mr. Elliff's financial condition to go any further with that matter. I told him so.

Q. Do you remember any of the provisions of the trust agreement that were suggested or discussed in your presence, with you and Mr. Ramsey?

A. Oh, there was a big question about who was going to be the trustee and who was going to sign the checks and where the deposits—what depository was to be used and how much was to be kept in the account to secure, so far as I remember, Twin City Lumber Company.

Q. As far as you remember, Twin City Lumber Company then is supposed to be a part to this trust agreement, right?

A. Well, I can remember this, Mr. Shapro. That the agreement, the trust agreement and the note, certainly as I understand it, was for the benefit of Twin City Lumber Company. [71]

Q. Who told you that?

(Testimony of Timothy O'Connor.)

A. That was the contention of the entire discussion in my office.

Q. Who told you that the note and the trust agreement were intended to be for the benefit of Twin City Lumber Company?

A. Well, all of the persons who were in my office, Mr. Elliff, Mr. Baum and Mr. Ramsey, made it quite clear that unless something was done immediately for the benefit of Twin City Lumber Company that they were going to close them up.

Q. Isn't it a fact, Mr. O'Connor, that as confided to you by the three gentlemen present, the only interest of Twin City Lumber Company was to get the \$28,000.00 note endorsed by Mrs. Lannin and then they would release the warehouse receipts to Mrs. Lannin?

A. That is—would you read the question?

(Question read.)

The Court: Do you understand the question?

The Witness: The transaction was not a completed transaction with the preparation of the note. They were to return the next day and see to it that this trust agreement was made up.

Mr. Shapro: I move to strike the answer, as being not responsive to the question.

The Court: It may go out. Answer the question. Do you understand it? [72]

The Witness: No.

Q. (By Mr. Shapro): You are sure?

A. That was not my understanding, no.

Q. You have a pretty good recollection of the

(Testimony of Timothy O'Connor.)

conversation, that conversation at the conference, Mr. O'Connor?

A. All I have, Mr. Shapro, is the rough hand copy of the note and the rough note on that yellow sheet. I knew that I couldn't complete the transaction. However, they wanted to get the note taken care of.

Q. I show you, Mr. O'Connor, the original of the installment note dated October 6th, 1953. I ask you to look at it and see if after examining it you want to change your testimony of the word of Mrs. Lannin, the guarantee, *where* on the reverse side of the note?

A. Well, I don't know that I want to change my testimony. I believe I testified that as I remember it the longhand copy that I used had the guarantee provision on the back of it and I didn't remember.

Q. I show you now, Mr. O'Connor, to refresh your recollection—it's a long time ago—the long-hand copy of the note.

The Court: Look on the face of it.

The Witness: Yes, it is on the face of it.

Q. (By Mr. Shapro): May I see Exhibit 6, please?

I ask you, Mr. O'Connor, to compare Plaintiff's Exhibit 6 for identification which I have shown you with what purports [73] to be the original. I ask you whether or not the photostat number 6 is a photostat of the original that I have just shown you.

A. So far as I can see it is, yes.

Mr. Shapro: We will offer in evidence if your

(Testimony of Timothy O'Connor.)

Honor pleases at this time the original of the installment note in question.

The Court: That is Defendant's Exhibit B. Put it in evidence.

(Thereupon the foregoing document was put in evidence as Defendant's Exhibit B.)

The Witness: Now I would like to add this to my testimony. You asked me if there was anything else discussed at this time. There was something discussed about Twin City Company doing business as Twin City Lumber Company and who the partners were and who apparently signed or have some control as to the signing of checks because this, I believe, that was the purpose of the term on the back of the note, the longhand copy of the note.

Q. (By Mr. Shapro): That is your best recollection of what is in your handwriting on the reverse side of the pink draft of the note which is part of Exhibit No. 5? A. That's right.

Q. Did you ever see the trust agreement as finally executed?

A. No, I didn't, Mr. Shapro. [74]

Q. Then you had no opportunity to compare the document as ultimately executed by Mrs. Lannin and Mr. Elliff and Mr. Pasquinelli with the details of the proposed agreement as explained to you in this conference, is that right?

A. That is right. I didn't have any further connection with the transaction.

Mr. Shapro: No further questions.

Mr. Robert Jacobs: No questions.

(Testimony of Timothy O'Connor.)

Mr. Huntington Jacobs: With the permission of the Court and counsel I will excuse the witness.

(Witness excused.)

LOUIS PASQUINELLI

called as a witness by the plaintiffs, sworn.

The Court: What is your full name?

The Witness: Louis Pasquinelli.

Direct Examination

Q. (By Mr. Huntington Jacobs): Mr. Pasquinelli, you have heard Mr. O'Connor's testimony?

A. I did.

Q. And where were you at the time that he referred to, say at the time of this conference that he mentioned?

A. Well, I don't know specifically where I was, but I know I was out of the office at that time.

Q. Were you out of town?

A. So far as I can recall, I was out of town, yes.

Q. Did you subsequently take part in this transaction?

A. I did.

Q. That he referred to. And when did you come into that picture?

A. I think on the 8th of October of 1953.

Q. Did you have a conference on that day with, say, Mr. Ramsey and Mr. Elliff and Mr. Baum?

A. I did.

Q. In your office?

A. Yes.

Q. And what was the subject matter of that conference?

A. Well, as I recall the matter they came in and

(Testimony of Louis Pasquinelli.)

stated that they made this note, the Twin City Lumber Company, and they wanted to prepare some kind of agreement whereby funds that were to come in from the Pine Supply Company were to be left with someone in trust and to be disbursed by him in connection with the bills of the Twin City, of the Pine Supply Company.

A. I neglected to ask you a formal question. You are a member of the State Bar in California?

A. Yes.

Q. And were such in October of 1953?

A. I was.

Q. And you were at that time. were you not, the attorney for Mr. Elliff? A. I was. [76]

Q. Now what was said in this discussion regarding the terms of the trust agreement?

Mr. Shapro: I am going to object, your Honor, to the form of the question on the ground it is leading and suggestive. This is a lawyer that is on the stand and he is the plaintiff's own witness. I don't think that the subject matter of any part of a conversation should be suggested to him by the interrogator.

The Court: I don't think it suggests the answer, Mr. Shapro, what was said about a certain subject.

Mr. Shapro: He is assuming, if your Honor please, he is assuming that there was such a subject discussed.

The Court: Well, if there wasn't I assume he will tell us that.

(Testimony of Louis Pasquinelli.)

Q. (By Mr. Jacobs): Will you answer the question I asked you of what was said on this subject?

A. Well, I don't have too vivid a recollection on this particular transaction. But perusing my notes, all I can tell you what my notes show is exactly more or less what is in the agreement itself. Now I don't recall just specifically what the discussion was except that I can say there must have been a discussion along the lines as shown in my notes. That is how those notes were made.

My recollection is to the effect that the purpose of the whole thing was to relieve Mr. Elliff of the responsibility of [77] collecting accounts receivable for his business and also to see to it that any business that was done and any monies collected therefor would be funnelled through a trustee.

Q. Funnelled to him for what?

A. Eventually, it turned out to be myself. I was to be trustee, eventually, in the course of the discussion.

Q. You were the funnel, I take it?

A. Well, maybe so.

Q. What was said regarding the application of these funds?

A. The funds were to be used primarily to pay the expense of the Pine Supply Company, that is, the current bills, as they came in in the course of doing business. There was to be at all times retained twenty per cent of all monies turned over to the

(Testimony of Louis Pasquinelli.)

trustee, this twenty per cent to be applied on the Twin City note.

Q. Of the gross?

A. Yes, of the gross, that's right.

Q. Now was there any discussion regarding the matter of the notice?

A. I recall that I mentioned it at that time, that for the thing really to be done there should be compliance of Section 3540 of the Civil Code of California. It was generally agreed that that would not be a good thing to do at that time because it was feared that if the creditors or Mr. Elliff learned of this transaction that they would all jump into the thing and it [78] would defeat the very thing that was trying to be accomplished.

Mr. Shapro: If your Honor please, I am going to move to strike the words of the witness "It was generally agreed," and thereafter upon the ground it is a conclusion of the witness.

The Court: Granted.

Q. (By Mr. Jacobs): Now please state what was said and by whom in relating this conference, what was said on this subject. You have already told us what you said, as I understand.

A. That I am sure of now. Now who said what in regard to it—but I know of the three gentlemen that were there—there was a general discussion on that subject and I couldn't say specifically.

Q. What instructions were given to you by the three people there and which of them gave the instructions to you?

(Testimony of Louis Pasquinelli.)

Mr. Shapro: If your Honor please, I object to the question upon the ground that it assumes a fact not in evidence that three people gave instructions. There is no evidence to that effect. He has testified that he was representing Mr. Elliff.

The Court: That is right.

Mr. Jacobs: Very well. I withdraw the question.

Q. Now were you given instructions regarding the matter of notice? [79]

A. I was. Now are we talking about notice, Mr. Jacobs, you are talking about Section 3540, isn't that right?

Q. Yes. A. Yes.

Q. Yes, I am talking about notice to creditors.

A. That is right. I can't recall specifically who gave me those instructions.

Q. Were all three parties that you have mentioned present at the time the instructions were given to you?

A. Yes, at all times during the conference.

Q. And you don't recall however which particular one of the three gave you the instructions regarding notice? A. No.

The Court: Did you get any instructions about notice?

The Witness: Not in writing. What I mean, it was like I said before—it was generally agreed.

The Court: Well, did you get any instructions about notice? You answered no.

The Witness: Yes.

(Testimony of Louis Pasquinelli.)

The Court: What is the difference, not to give notice?

The Witness: Not to give notice, yes, that is right.

Q. (By Mr. Jacobs): Not to give any notice?

A. That's right.

Q. Was there any discussion during that conference as to the financial condition of Pine Supply Company or Mr. Elliff? [80]

A. There was.

Q. And what was said on that subject and by whom?

A. Well, the same thing again. I can't say specifically who said any of these things, Mr. Jacobs, but I do know the matter of the finances was discussed.

Q. And all three people were present at the time of the discussion?

A. Yes.

Q. Can you tell us what was said about the financial condition of the Pine Supply Company?

A. Well, to my recollection there was a discussion concerning what amount of stock and trade was on hand, more or less what amount of accounts receivable the business had. And there was some discussion as to what liability there was about it. I don't remember amounts or anything at this time.

Q. How long had you been representing Mr. Elliff at this time, Mr. Pasquinelli?

A. Oh, I don't know. I have known Mr. Elliff since about 1950. I have been representing him more or less since then.

(Testimony of Louis Pasquinelli.)

Q. Were you connected with the Coast Range Lumber Company transaction?

A. Yes, I was.

Q. And was Mr. Elliff one of your associates in that matter? A. He was, yes. [81]

Q. At the conclusion of this venture did you know anything about the financial condition of Mr. Elliff?

A. That would have been in the year 1952, I believe; yes, yes.

Q. And what can you tell us about his financial condition at that time?

Mr. Shapro: I am going to object to the question if your Honor please upon the ground it calls for the opinion and conclusion of the witness and no proper foundation has been laid.

The Court: I am inclined to think it does, counsel.

The Witness: Well, so far as I know——

Mr. Jacobs: Just a minute. The objection has been sustained to the question.

The Witness: Oh, I am sorry. I misunderstood you.

Q. (By Mr. Jacobs): Did he owe you any money?

A. Yes, I guess he did; yes, on some guarantee agreement that we had signed jointly.

Q. And do you know whether or not he was indebted to one Charles Lannin?

A. I think he was on the same basis.

(Testimony of Louis Pasquinelli.)

Q. And what was the aggregate amount of the indebtedness?

A. Oh, I don't know definitely. But I think it was around \$13,000.00 or something to that effect.

Q. Now did you represent Mr. Elliff during the operation of [82] Abbot Lane partnership?

A. I did, yes, on some matters.

Q. And did you represent him at the time of the dissolution of that partnership? A. Yes.

Q. Did you make any inquiry as to the net worth of that part to ascertain—I am not asking you what it was—but did you make any inquiry to ascertain what the net worth of that partnership was at the time of the dissolution?

A. I don't recall specifically but I do think that there was some financial statement or something around there to that regard. I don't recall just what it was now.

Q. I see. Now in this conference regarding the terms of the Twin City agreement did Mr. Ramsey take part in the discussion? A. Yes.

Q. Did he take an active part? A. Yes.

Mr. Shapro: Object to the question on the ground it calls for the conclusion of the witness.

The Court: Well, it does. He has answered it.

Q. (By Mr. Jacobs): When you had received the data as to what was to be included in the trust agreement—withdraw that.

Did you put anything into that agreement that had not been discussed at that conference regarding the terms of the agreement? [83]

(Testimony of Louis Pasquinelli.)

A. Not to my knowledge.

Q. You did finally prepare the agreement?

A. I did.

Q. Did you not? A. I did.

Q. What was done with it after you had prepared it?

A. Well, my best recollection is that as a result of the telephone conversation with Mr. Robidoux that he picked up one or more copies of it. Then he mentioned it was signed. I don't recall whether it was signed in my office or just where, but he mentioned it was signed.

Q. Do you recall the date on which he picked up those copies?

A. No, I don't. I don't know now whether the agreement was prepared on the same day that we had the conference or not. I couldn't say.

Q. Do you remember what was done with the note that you have heard mentioned by Mr. O'Connor?

A. So far as the note is concerned, I don't know that. I didn't see it before this agreement was made, but maybe I am wrong on that. But I don't have any recollection on that score. I have seen it since, I think, but I didn't see it at that time.

Q. Am I correct in understanding that the purpose of this conference at which the trust agreement was discussed was [84] entirely the terms of the trust agreement and what was to be done about it when it was completed? A. That's right.

Q. Now when was this trust agreement and the

(Testimony of Louis Pasquinelli.)

note—or when were the trust agreement and the note signed, if you know?

A. I don't recall. The only recollection I have is that I believe the note had been signed before I conferred with the people at all. And just when the trust agreement was signed, I don't have any independent recollection on that at all.

Q. Were you present at the time when these documents were signed?

A. I don't recall, Mr. Jacobs, I don't recall.

Q. The trust agreement appointed you—or just a moment, get this trust agreement in evidence. I show you a document entitled "Trust Agreement" bearing date the day of October, 8th day of October, 1953, and bearing what purports to be the signatures of George F. Elliff, Louis Pasquinelli as trustee, and Pearl K. Lannin as beneficiary, Mr. Elliff being described as trustor, and ask you whether that is the trust agreement to which you have referred? A. That is.

Q. Do you recognize these signatures?

A. I do.

Q. Are they the signatures of the persons whose signatures they purport to be? [85]

A. Yes, I believe so.

Mr. Jacobs: We offer this in evidence as Trustee's next in order.

Mr. Shapro: To which if your Honor please we object upon the grounds that it is incompetent, irrelevant and immaterial and not binding upon the defendant Twin City Lumber Company in this case.

(Testimony of Louis Pasquinelli.)

Twin City Lumber Company not being a party to the agreement on its face.

The Court: The objection may be overruled and it may be admitted and marked as Exhibit No. 7.

(Thereupon the foregoing Trust Agreement was admitted and marked as Exhibit No. 7.)

Q. (By Mr. Jacobs): Now as trustee under that trust agreement, Mr. Pasquinelli, how long did you serve?

A. Oh, may I look at my file on that, Mr. Jacobs? I don't recall definitely.

Q. Perhaps there wouldn't be any serious objection if to shorten the time I suggest to the witness that he examine his account as trustee, I mean, his record of checks issued.

A. May I answer the question now? So far as I can?

Q. Yes, please.

A. The only thing I can tell is that from my file I see that on the blank day of April, 1954 I had prepared a termination of trust and release, so I assume that my duties as trustee terminated sometime in April of 1954. [86]

Q. Did you keep a record of the checks that you issued as trustee? A. I did.

Q. Do you have that record with you now?

A. I have the sheets from my trustee ledger, yes.

Q. Now I show you what purports to be a photostat of a record entitled Louis Pasquinelli, trustee for Pearl K. Lannin, analysis of cash receipts and disbursements, Anglo-California National Bank. Is

(Testimony of Louis Pasquinelli.)

that a photostat of the account of such transactions that you have just referred to?

A. No, it is not, Mr. Jacobs. I think it is compiled, however, from the ledger sheets that I just spoke of but it is not a photostatic copy of the ledger sheets.

Q. I see. Do you know when this document was compiled?

A. I don't recall. It was sometime after I had terminated my duties as trustee, but I don't recall just when.

Q. Was it compiled at your request?

A. I don't recall whether it was compiled at my request or yours, to tell you the truth. But it was compiled in my office I believe, by Mr. Baum, if I am not mistaken.

Q. You have your ledger sheets?

A. I do, yes.

Q. Well I would just like to deprive you of them. I think we had better have your records showing the disbursements that you made because they include, if your Honor please, number one, [87] at least, of the disbursements that are referred to in this case. Perhaps I can offer it this way, and avoid depriving the witness of his records.

Q. Did you as trustee under that trust agreement ever issue any check that you were not requested to issue by Mr. Elliff?

Mr. Shapro: I am going to object to that question if your Honor please upon the ground it is immaterial, incompetent and irrelevant. In other

(Testimony of Louis Pasquinelli.)

words, we take the position that the objectivity of the trustee under that trust agreement is not binding upon us. We are not parties to it.

The Court: Well, if that develops, won't that go to the weight of it? I will permit him to answer.

The Witness: So far as I know, all checks were issued with Mr. Elliff's—at Mr. Elliff's direction.

Q. (By Mr. Jacobs): Now did you issue any checks to the old firm, that is Twin City Company?

A. I issued a check to whoever was named on the note that we are talking about, yes. I believe it was Twin City Company.

Q. Will you find the date of that check and state the amount of it, of the check that you issued?

A. Well, here on the ledger reveals that on December 30th, 1953, a check in the sum of \$2,500.00 was issued to Canadian Bank of Commerce. Now——

Q. Can you tell us the purpose of this check?

A. The purpose of that check was, so far as I knew, to apply [88] it on this note. I had received a letter from the Canadian Bank of Commerce to the effect that the matter had been referred to them for collection; that is, the note had been referred to them for collection.

Q. Did you have any other occasion than that of making a payment of the note to send a check to the Canadian Bank of Commerce at that time?

A. I think that was the only payment that I made to them.

Q. Now can you tell us positively whether that

(Testimony of Louis Pasquinelli.)

was or whether it was not a payment on account of that note?

A. So far as I was concerned it was, yes.

Q. It was? A. Yes.

Q. Mr. Pasquinelli, where did the funds that paid that check come from?

A. Out of monies that were turned over to me from the Pine Supply Company under this trust agreement.

Q. Turned over to you by whom, Mr. Pasquinelli?

A. Mostly by Mr. Elliff. But then some funds I received myself through the mail and so forth.

Q. On account of what accounts receivable?

A. On account of accounts receivable, yes.

Q. Of that company? Who collected the accounts receivable under that trust agreement?

A. Well, now I don't know who collected them. All I can [89] tell you is who brought me the money when it was brought to me.

Q. And who was that, was that Mr. Elliff?

A. Ordinarily, unless he sent it up through one of his men. Ordinarily he would bring the checks up.

Q. Was any notice of the trust agreements given to creditors of the Pine Supply Company that you know? A. Not to my knowledge.

Q. Of any kind and nature?

A. Not that I know of. I don't recall giving any notice to anyone.

Q. Would you answer the same with respect to

(Testimony of Louis Pasquinelli.)

the note? Was any notice given to any of the creditors of the discussion of that note?

A. Not to my knowledge.

Q. You terminated your connection with the trust, you say, in April?

A. I believe that is correct.

Q. What did you do with the funds that were then on hand in the trust, if there were any?

A. I turned over to Pearl K. Lannin on the 24th of—the ledger sheet shows the 24th of March, that is probably correct, on the 24th of March I turned over to Mrs. Pearl K. Lannin the sum of \$2,063.72.

Q. And did you have any further dealings with the trust [90] funds or with the business of the trust after that? A. I believe not.

Q. Of your own knowledge do you know whether any other trustee was appointed to administer the terms of the trust after you ceased to be trustee?

A. I can't say that I can say of my own knowledge, no.

Q. As trustee for Mrs. Pearl K. Lannin, what if any dealings did you have with that lady?

A. Mrs. Lannin?

Q. Yes.

A. Oh, no dealings other than she on occasion would inquire about these things. But I mean I didn't represent her.

Q. Did she ever give you any instructions as to what she wanted you to do as trustee?

A. Not that I recall.

(Testimony of Louis Pasquinelli.)

Q. Is it correct to say that all the instructions you did receive in that regard came to you from Mr. Elliff? A. I think so.

Q. Did you have any correspondence while you were serving as trustee with Twin City Company?

A. I did.

Q. In what connection?

A. I received one or two letters concerning some account that—current account that the Pine Supply owed to them and asking whether or not they could be paid. [91]

Q. Now during the time that you were serving as trustee—I think your testimony is you started in shortly after October 10th, is that right?

A. I believe that is right. The first entry of any funds shows October 13th, 1953.

Q. Was any purchase made of merchandise from Twin City Company by Pine Supply Company?

A. I cannot—I could not say that to my own knowledge. I had nothing to do with matters of that kind.

Q. Did the correspondence deal with any such purchase that you have just mentioned?

A. You mean the correspondence from Twin City?

Q. Yes. A. I believe that it did.

Q. And do you have the correspondence that you have just referred to? A. I believe I do.

Mr. Jacobs: May I see it?

The Witness: Yes.

The Court: Let's take a recess at this time.

(Testimony of Louis Pasquinelli.)

(Recess.)

Q. (By Mr. Jacobs): During the recess, Mr. Pasquinelli, you have examined your correspondence file? A. I have.

Q. Do you find anything in that file that has to do with that [92] \$2,500.00 payment to which you have referred? A. I do.

Q. Will you please produce that?

A. I don't know whether Mr. Roberts has seen that or not.

Q. You have just handed me what purports to be a letter dated December 30th, 1953 addressed to yourself by Pearl K. Lannin. It says,

"You are authorized to pay to the Canadian Bank of Commerce the sum of \$2,500.00 out of the trust funds held by you, this amount to be applied on the promissory note of George and Audrey Elliff for \$28,000.00 which is dated October 6th, 1953, and payable to the Twin City Lumber Company."

Do you recognize the signature?

A. I do.

Q. Is that of Pearl K. Lannin? A. It is.

Q. Have you any reason to want to retain this letter in your files? A. Not particularly.

Mr. Jacobs: Well, to complete the record, your Honor, we will offer it.

The Court: Exhibit 8.

(Thereupon the foregoing letter was introduced in evidence as Plaintiff's Exhibit No. 8.)

Mr. Jacobs: I think you can take the witness.

(Testimony of Louis Pasquinelli.)

Cross Examination

Q. (By Mr. Shapro): Mr. Pasquinelli, am I correct in assuming that this letter from Mrs. Lannin, which is dated December 30th, 1953, was procured by you from her before you issued the check for \$2,500.00 for the Canadian Bank which you previously identified? A. I believe it was.

Q. Mr. Pasquinelli, you have testified in response to one of Mr. Jacob's questions that you did not put anything in the trust agreement other than that which was discussed before you at this meeting, is that right? A. That is right.

Q. Is it also true that you did not omit from the agreement anything which was discussed in front of you and for the purposes of the meeting included in the agreement?

A. I believe that is right.

Mr. Shapro: No other questions.

Redirect Examination

Q. (By Mr. Robert Jacobs): Mr. Pasquinelli, at this meeting that you have referred to, was there any discussion that took place as to any need for a return in this whole transaction?

A. I believe there was such a discussion.

Q. Can you identify the parties who made any reference to a need for a return? [94]

A. Well, I believe both Mr. Elliff and Mr. Ramsey both stated that the matter was urgent.

Q. Can you remember what Mr. Ramsey had to say on this particular point?

(Testimony of Louis Pasquinelli.)

A. I don't recall specifically except that there was talk about the fact that Mr. Hunter and the Twin City Company either wanted something down right away or else he was going to have to close Mr. Elliff's place of business down.

Q. Was there any discussion at that meeting regarding who would guarantee the note?

A. I don't recall that because if I remember correctly the note, as I stated before, had already been executed. I don't think it entered into the discussion.

Q. Was the note present at this discussion?

A. I don't recall, Mr. Jacobs.

Q. Do you recall whether Mrs. Lannin had signed the note at the time or not?

A. No I don't.

Q. Were there any discussions made during this discussion by Mr. Ramsey as to what would be put into the trust agreement?

A. I can't recall any specific discussion. There was something about it made, but I know he was in the general conference. I know the general conversation between myself and Mr. Ramsey concerned the whole transaction.

Q. Isn't it true that Mr. Ramsey insisted on the trust [95] agreement?

Mr. Shapro: I object to the form of the question, your Honor, upon the ground that it calls for the opinion and conclusion of the witness.

The Court: Sustained.

Q. (By Mr. Jacobs): Do you remember any

(Testimony of Louis Pasquinelli.)

statements made by Mr. Ramsey in which he insisted upon the trust agreement?

Mr. Shapro: Same objection, if your Honor please.

The Court: Well, do you remember any statements made by Ramsey concerning the trust agreement of any kind?

The Witness: None specifically except like I say he was in general conversation concerned with the preparation of the agreement; but nothing specifically that I can recall.

Q. (By Mr. Jacobs): During this conversation all of the terms of the trust agreement were discussed? A. They were, they were.

Q. And was a discussion held as to twenty per cent of the gross? A. Yes.

Q. Received that should be withheld? A. Yes.

Q. Mr. Ramsey took part in that discussion?

A. So far as I can recall he did.

Q. Do you recall whether Mr. Ramsey suggested that or not?

A. I can't recall specifically. I couldn't truly say that [96] I do.

Q. It is true, isn't it, that a discussion was held in which twenty per cent—it was mentioned that twenty per cent would be retained and applied on the notes payable to Twin City?

A. I think that is correct.

Q. Did Mr. Ramsey make any request to you that he be given a copy of the trust agreement when it was completed?

(Testimony of Louis Pasquinelli.)

A. No, I don't recall. I don't recall whether he did or he didn't.

Q. When the check was made out that you discussed in your testimony to Mrs. Pearl K. Lannin at the termination of your trusteeship, was that check delivered by you to Mrs. Lannin?

A. I don't believe it was.

Q. Who was it delivered to?

A. If I recall correctly, I believe it was given to Mr. Elliff. I am not positive, but I think it was given to Mr. Elliff. It was made payable to Pearl K. Lannin.

Mr. Jacobs: No further questions.

Mr. Huntington Jacobs: With the permission of the Court and counsel I will excuse the witness.

(Witness excused.)

Mr. Huntington Jacobs: Mr. Baum who has been mentioned in Elliff's testimony and that of the other witnesses is present in Court, your Honor. He is a Certified Public Accountant of San Jose. I am told by him that if it is possible [97] to complete his testimony today, it would be of great convenience to him. I don't know.

Mr. Shapro: I am sure that can't be done. I say that advisedly. I am sure that the cross examination of Mr. Baum alone will take more than the time remaining in the afternoon.

Mr. Jacobs: Then there is no purpose in putting him on out of order. Mr. Elliff, will you resume the stand?

GEORGE F. ELLIFF

previously sworn, resumed

Redirect Examination

Q. (By Mr. Huntington Jacobs): Mr. Elliff, you have told us that during the period from about the middle of May until the last part of September you received a number of letters from the old firm relative to your account with that firm. Did you receive any other communications from Mr. Hunter?

A. There was numerous phone calls from various occasions.

Q. Over what period of time?

A. Well, from the very conception of the agreement on the warehousing agreement.

Q. And extending to what period? To what time?

A. Up until the time of bankruptcy actually.

Q. In other words, to and beyond the time of this October transaction that we have just been talking about?

A. Well, they became less frequent after October.

Q. I see. Now can you give us the dates of these several conversations? How many of them were there, let's ask that question first? [98]

A. The average was probably once a week, weekly, or maybe even more so.

Q. How did they originate?

A. Well, Mr. Hunter would contact me by phone from his Los Angeles office on different phases of the business, the progress he was making, how the

(Testimony of George F. Elliff.)

account stood moneywise, mostly moneywise always.

Q. Did he make inquiry of you in those conversations regarding the condition of the business, the financial condition of it? A. Yes, he did.

Q. And did you inform him in that regard?

A. Yes. It was openly discussed.

Q. And did you tell him accurately what the condition was? A. Yes, I'd say I did.

Q. Now when was the last of these conversations by telephone, when did that occur, the last prior to the 6th of October, 1953?

A. If I recall correctly it was in the latter part of September.

Q. And from what point did that telephone call originate? A. I believe from San Francisco.

Q. Now with whom did you talk on that occasion?

A. I first talked to Mr. Ramsey and then Mr. Hunter, which I had had knowledge was also on the extension.

Q. You evidently have some knowledge that he was on the [99] extension. How did you learn that fact?

A. Well, after the conversation became pretty heated then he spoke up, at which time I knew he was on the line.

Q. And what was discussed in that conversation?

A. He was very unhappy and dissatisfied with the affairs.

Q. No, just give us the subject matter.

(Testimony of George F. Elliff.)

A. He was making demands on collecting these accounts receivable and the warehouse agreement as it was originally written. He was very unhappy about it and dissatisfied. He made it very plain that he wanted something done immediately.

Q. And what was said and by whom in that connection?

A. Well, Mr. Hunter stated that he was going to get *us* money somehow. I told him that if it was humanly possible I would like to pay him immediately to get out from under his thumb. He said he didn't care what happened to the rest of the people, that he wanted his now. That was the gist of it.

Q. Was any suggestion made at that time by any party to the conversation as to the way in which this payment may be made or obtained?

A. No, sir, not at that time.

Q. Now subsequent to that time did you have a conversation with Mr. Ramsey in that same connection?

A. Numerous conversations, I believe, would be more correct.

Q. And did you have any conversation with Mr. Ramsey in the course of which you discussed about entering into a new [100] arrangement?

A. Yes, I did.

Q. I see. And when did that conversation occur and where?

A. I believe the first suggestion came from me by telephone to Mr. Ramsey on a Monday after we had been to the bank on a Thursday or a Friday or

(Testimony of George F. Elliff.)

Thursday. That was where I left off and at noon when I said Mr. Ramsey accompanied me to the Hester Branch Bank of America. At that time I mean I was up to my wit's end.

The Court: What month was this?

The Witness: In September of 1953.

The Court: Well, a moment ago you just testified in response to a question to the last conversation before October 6th.

The Witness: That is what you asked about.

Q. (By Mr. Jacobs): That was the last telephone conversation, your Honor. Now I am asking whether he subsequently had any conversations with Mr. Ramsey regarding a new agreement.

The Court: That is before October 6th, you mean?

Mr. Jacobs: Prior to October 6th, yes.

The Witness: Yes, I did.

Q. (By Mr. Jacobs): You did?

A. Yes, sir.

Q. And now tell us again when this—or tell us when that occurred? [101]

A. I'd say within four or five days prior to the signing of the agreement, trustee agreement and the note.

Q. Very shortly before the signing?

A. The signing of the note.

Q. Or had the note been prepared at that time?

A. No, sir.

Q. Had the trust agreement been prepared?

A. No, sir.

(Testimony of George F. Elliff.)

Q. Had either of these conferences that Mr. O'Connor and Mr. Pasquinelli testified to taken place? A. No, sir.

Q. How long before the first of those conferences took place was this conversation?

A. I say two days prior to entering Mr. O'Connor's office on writing up the note, if I remember correctly.

Q. Now did this conversation with Mr. Ramsey precede or did it follow the telephone conversation that you have just referred to with Mr. Hunter?

A. It followed.

Q. It followed. How long after that was it?

A. Oh, ten days I would say.

Q. Now did it precede or follow this interview that terminated in a visit to the Hester Branch of the Bank of America?

A. The telephone conversation?

Q. No. The talk with Mr. Ramsey that we are—— [102] A. It followed.

Q. It followed? A. Yes, sir.

Q. Then let us get the substance of this conversation with Ramsey that wound up at the Hester Branch of the Bank of America. Have you told us all that occurred in that conversation?

A. I don't recall. But I could review what was said.

Q. Please do.

A. He was there as an agent of Twin City Lumber Company to establish some way, workable way

(Testimony of George F. Elliff.)

for both myself and their company to pay them up in full.

And he gave me I'd say two or three alternatives in which to arrive at that. One was to pay up in full and they would give me back the warehouse receipts. Another was to lock me up.

The Court: What was that?

The Witness: Lock me up. I mean, lock up the warehouse and discontinue business, which they did. Or to make some other arrangements it was left up to me to come up with.

Q. (By Mr. Jacobs): What did they say—what did Mr. Ramsey say regarding the continuance of the May agreement if he said anything?

A. It was terminated right then and there. I presumed at that time. [103]

Q. And what was said in that regard by Mr. Ramsey, if anything?

A. He gave me direct orders to lock the warehouse and to discharge anyone that was working for Pine Supply Company.

The Court: Gave orders to do what?

The Witness: To lock up the warehouse and discharge all employees. We were permitted only to continue business if we would want to under cash sales, which I could stay there and carry on the business, but I could only sell the material for cash.

Q. (By Mr. Jacobs): Was anything said about any further deliveries under the May agreement from Twin City Company?

A. They had been discontinuing, the order had

(Testimony of George F. Elliff.)

been discontinued in August of that year.

Q. Now at what time was the warehouse locked up, as you say?

A. I'd say around the 30th of October, 1953.

The Court: 30th of October?

The Witness: I mean September, pardon me, sir, of September.

Q. (By Mr. Jacobs): Now after that conversation with Mr. Ramsey what did you do in reference to preparing a new agreement, if you did anything?

A. Well, I talked it over with them, with my wife. Then I went and talked to my mother-in-law and said that the only solution I could possibly think of myself was to——

Q. Is this a conversation between you and your mother-in-law? [104]

A. This is a solution that I came up with with Mr. Ramsey.

Q. Is that what you told Ramsey?

A. That if she would sign a note for \$28,000.00 that we could work out some arrangements where the inventory could be her security and the signing of the note as guarantor and I mean to continue.

Then I believe, if I am correct, I saw Mr. Ramsey or either he came to the warehouse again the following week, I believe this took place over the week end.

On Monday I had a conversation and told him what I proposed to do or could do. He mentioned that he could not give me the final answer but he would discuss this with Mr. Hunter and that since

(Testimony of George F. Elliff.)

time was of the essence in it he would give me an answer as soon as possible, which he did.

Q. Was this before or after the warehouse was locked up?

A. This was after the warehouse had been locked up.

Q. I see. Now then what happened next in reference to the negotiation of a new agreement?

A. There was several phone calls back and forth with Mr. Ramsey and myself. I believe Mr. Hunter called me directly and stated that he would consider this subject to submission of Mrs. Lannin's financial statement.

Q. Now you speak about an inventory being made security. Who suggested that arrangement?

A. To whom, sir? [105]

Q. Who suggested it to you? Did you originate the idea?

A. I originated that idea, yes.

Q. Now as to the terms in which this agreement arrangement was to be embodied, who suggested them?

A. The trustee agreement and the trustee account was at the insistence of Mr. Ramsey.

The Court: What idea did you originate?

The Witness: My mother-in-law co-signing of the note.

Q. (By Mr. Jacobs): Now when was this suggestion made by Mr. Ramsey?

A. In the office of Mr. Louis Pasquinelli.

Q. And when?

(Testimony of George F. Elliff.)

A. I believe in the morning of October 4th.

Q. And who was present?

A. Mr. Pasquinelli and myself and Mr. Baum.

Q. And what was said and by whom regarding the terms of this new arrangement at that interview?

A. Mr. Ramsey stated to Mr. Pasquinelli that there would be some arrangements made to where they could be guaranteed the money.

Q. Who are "they"?

A. Twin City Company, their money, because they wouldn't rely on any signature on a check by myself.

Q. Now this you are saying was on the 4th, I take it? That was prior then to the conference with Mr. O'Connor? [106]

A. It was after the conference with Mr. O'Connor.

Q. The note bears date October 6th, Mr. Elliff. Does that refresh your memory as to the probable date of this conference that you are just referring to now?

A. Well, I still would cling to the idea that it was the 4th because I think Mr. Pasquinelli was out of town two days. I am not sure. But I know he was out of town at the time we agreed to do this.

Q. What is your recollection as to which of these documents was prepared first?

A. My recollection?

Q. I mean by these documents the note and the trust agreement?

(Testimony of George F. Elliff.)

A. The note was prepared first. That was to show good faith on our part.

Q. Was the note signed prior to the execution of the trust agreement or not?

A. If my recollection is right, it was signed—they were both signed at the same time.

Q. Now at this conference you heard Mr. Pasquinelli's testimony, did you not? A. I did.

Q. Are you referring now to the same conference that he was referring to?

A. I was. I am referring to—had been referring to the rough draft of the trustee agreement. [107]

Q. You say that the parties present there were Mr. Ramsey and yourself and Mr. Baum as well as Mr. Pasquinelli, is that correct?

A. That is correct.

Q. And do you recall what part Mr. Ramsey took in that discussion?

A. He laid out the percentage which was too high.

The Court: Laid out the what?

The Witness: The percentage that would be withheld from gross receipts which was too high. I objected to it and Mr. Baum objected to it. Then we mutually agreed that the business couldn't stand that much, which was thirty per cent. I believe, and we settled on twenty per cent.

We also wanted three years in which to pay off the note. He wouldn't go along with that idea. We finally settled on twenty-two months.

Q. (By Mr. Jacobs): Was this discussion about

(Testimony of George F. Elliff.)

the payment of the note—did that take place at this conference at Mr. Pasquinelli's office in his presence? A. Yes.

Q. Let us go back for a moment and examine the conference that Mr. O'Connor referred to. I think you have testified that that took place about two days previous to this?

A. A day or two days.

Q. A day or two days previous. And who was present on [108] that occasion according to your recollection?

A. Mr. Baum, Mr. O'Connor, and Mr. Ramsey and myself.

Q. And what subject or subjects were discussed at that conference?

A. The drawing up of the note which we had agreed to by that time. They were trying to hold it to round figures, it was \$28,116.00, if I remember right. We agreed that we would pay \$116.00 and make an even \$28,000.00.

Mr. Ramsey, as I recall, made certain suggestions that Twin City were going to insist upon if they were going to agree to this at all. I mean it was more or less a general discussion but Mr. O'Connor wouldn't continue until Mr. Pasquinelli came back.

Q. Well, there was discussion, was there, at that conference of the terms of the trust agreement?

A. It was brief, but there was, yes.

Q. And was there discussion at that conference regarding the terms for payment of the note?

(Testimony of George F. Elliff.)

A. I believe so, sir. But it wasn't concluded, it wasn't final.

Q. It was not final? A. No, sir.

Q. And that discussion as well as the discussion regarding the terms of the trust agreement was continued, was it, at this second conference? [109]

A. Until Mr. Pasquinelli returned, yes.

Q. I see. Now you have examined the trust agreement, have you not?

A. Yes, I have read it.

Q. Can you tell us whether all of the terms of the trust agreement were discussed at this conference before Mr. Pasquinelli?

A. Before Mr. Pasquinelli?

Q. I mean in Mr. Pasquinelli's presence.

A. In his presence, yes, they were.

Q. Was Mr. Ramsey continuously present during that discussion? A. Yes, sir.

Q. Now have you told us all of the terms of the trust agreement that Mr. Ramsey suggested?

A. He voiced an opinion throughout the whole draft of the trustee agreement that he was present at all times.

Q. You mean that he *pressed* an opinion regarding each of these terms as it was discussed?

A. Generally, yes.

Q. Now was the matter of notice according to your own recollection discussed at this meeting with Mr. Pasquinelli?

A. I recall it very vividly, yes.

Q. And what was said and by whom according

(Testimony of George F. Elliff.)

to your recollection regarding that matter of notice? [110]

A. It was at Mr. Pasquinelli's suggestion that we did file under a certain section, which I am not familiar with. But it was mutually agreed not only by Mr. Ramsey because of the notice and the commotion it might create, but Mr. Baum and myself thought that it would be better to frankly hide the facts rather than put them on notice so that other creditors would be aware of this.

Q. Now was any notice, to your knowledge, given to creditors of the execution of the note? I mean to your creditors or any of them?

A. Not unless you could say that the checks, a trustee account.

The Court: What?

The Witness: The checks that were written by Mr. Pasquinelli did carry a trustee account.

Q. (By Mr. Jacobs): That is those checks that Mr. Pasquinelli issued carried that?

A. Yes, sir.

Q. And that is the only notice that you know of that was given to creditors, this transaction?

A. I can speak only for myself. But I gave no written notice to no other creditors.

Q. Do you know of your own knowledge of anyone else of having done so?

A. I am quite sure they did not. [111]

Q. Now who was it that suggested the reason for not giving notice to creditors, if you can remember?

(Testimony of George F. Elliff.)

A. There was just a mutual agreement. Everyone scorned on the idea.

Q. You all unanimously reached this agreement and refused to follow Mr. Pasquinelli's suggestion, is that your testimony?

A. Well, it was a little more thorough than that. We discussed it openly and we found the pros and cons of it not to be good. It wouldn't be conducive to continue to being in business, we decided.

Q. Was there any discussion as to what the creditors were likely to do specifically if they learned about this transaction?

A. I recall Mr. Pasquinelli saying that "You know this could be invalid." I do remember that. I mean he brought that up. He emphasized the fact.

Q. Was there any discussion as to any other actions that creditors might be expected to take if they learned of this transaction?

A. Yes, there was.

Q. And tell us the substance of that discussion.

A. Well, the subject was a concern to everyone present including Mr. Ramsey, Mr. Baum and myself and even Mr. Pasquinelli because he was quite aware of my affairs as to [112] what other creditors might do because we had had, I think, one attachment upon Pine Supply. So there was decided, but never carried out, that we would make the checks certified until we could more or less get ourselves out of the bind we were in. But it was never carried out.

(Testimony of George F. Elliff.)

Q. That provision of the trust agreement was not carried out, carried into effect?

A. No, sir.

Q. May I have that trust agreement I think it's in evidence. Thank you, sir.

I call your attention to this clause in the trust agreement which is Exhibit 7, "That in order to alleviate as much as possible the manual work involved in the administration of this trust, it is agreed that the trustor and/or his accountant shall submit to the trustee the proper invoices and vouchers, along with checks drawn by the trustor in payment thereof—the said check to be drawn upon the said trustor's personal account—and in order to forestall the possibility of attachment or other levy upon the said account, the said checks to be certified—and in turn, the said trustee shall deposit from the trust account into the account of the trustor [113] sufficient monies to honor the said checks, and the trustee shall thereupon mail the checks to the persons entitled thereto."

Was there a discussion of that clause at that interview with Mr. Pasquinelli prior to the preparation of this agreement?

A. I think every phase in that agreement was discussed, as Mr. Pasquinelli stated.

Q. Was there a discussion as to the reason for including such a clause in the agreement?

A. Yes, we were afraid of more attachments.

Q. Now after the trust agreement had been prepared and the note had been prepared, what was

(Testimony of George F. Elliff.)

done with those documents, if you know?

A. When you speak of document, what document?

Q. The note and the trust agreement.

A. I was instructed by Mr. Ramsey that as soon as they were signed that I was to furnish him with a copy so that he could approve them, which I did. I drove to San Rafael myself and Mr. Baum and met him over there in a restaurant. He examined them, read them, and said that he would mail them to Los Angeles.

However, I was also instructed by Mr. Ramsey to furnish a financial statement of Mrs. Lannin's.

The Court: When you say these documents, what are you talking about? [114]

The Witness: I am speaking of the note, the trustee agreement.

The Court: Well, the note was that the form of that also to be submitted to Ramsey.

The Witness: Ramsey had first seen it, it wasn't signed by Mrs. Lannin. He wanted proof that she was going to sign it.

The Court: He had already seen the note at that time, hadn't he?

The Witness: But he hadn't seen her signature. And a letter which stated that they would return the bad checks, as I said, I didn't have the financial statement of Mrs. Lannin at that time, but I assured him that I would have it the following day and to expedite the entire matter and get it off the calendar, why, I told him I was going to Los Ange-

(Testimony of George F. Elliff.)

les and that I would personally deliver these documents, meaning the trust deed and the note and the financial statements and this letter which accompanied to Mr. Hunter in person, which I did.

Q. (By Mr. Jacobs): Now before we go further, let's get back to this matter of the signing of these documents. They were executed as the document shows and when was that done and where was it done?

A. At Mrs. Lannin's house, I believe; in San Jose.

Q. Were they all executed at once or not?

A. I believe so, sir, I believe they were.

Q. I shouldn't have used the word "All". I meant to refer [115] to the note and the trust agreement.

A. Yes. It was after Mr. Robidoux had examined them and had delivered them to Mrs. Lannin that I picked them up. I recall that. I believe I signed them at the time I picked them up that evening, which must have been October 8th.

Q. That is the date that is borne by the trust agreement?

A. Yes, sir.

Q. Now do you recall by any other reason that it is the date of the trust agreement?

A. No, sir.

Q. This however occurred before you went over to see Mr. Ramsey, did it?

A. Yes, sir.

Q. Now what was it you say that you took to Mr. Ramsey?

A. I took this document here, the trust agreement, a letter which they were to sign and send

(Testimony of George F. Elliff.)

back to us agreeing to send back certain checks that had not been recognized by the Bank of America that they were holding, and the note. But I did not have one document that they requested and that was the financial statement.

Q. Were you alone when you took these documents to Mr. Ramsey on this occasion?

A. No, sir.

Q. Who was with you? A. Mr. Baum.

Q. And where did you see Mr. Ramsey?

A. Venetia Palms, I believe it's a restaurant and motel, hotel in San Rafael.

Q. Did Mr. Baum attend your conference with Mr. Ramsey there? A. He did.

Q. What happened at that time in reference to those documents?

A. Mr. Ramsey examined, read them carefully, I would say.

Q. Did that include the trust agreement?

A. Did it conclude it?

Q. Did it include it? A. Yes, yes, sir.

Q. Who suggested this letter regarding the return of the bad checks?

A. My attorney, Mr. Pasquinelli.

Q. Were the bad checks ever returned?

A. No, sir.

The Court: Where were they?

The Witness: They were in Los Angeles at that time.

The Court: They were checks to the Twin City Lumber Company by you?

(Testimony of George F. Elliff.)

The Witness: By me, sir.

The Court: And had been refused payment at the bank and then had been returned to the Twin City Company, is that [117] right?

The Witness: That's right, sir.

Q. (By Mr. Jacobs): And have they ever been paid, these checks that you are now referring to?

A. Well, it was my understanding and also my attorney's that in drawing up that letter and in drawing up the trustee agreement that that covered the checks. There was some \$18,000.00 owing, say, in open accounts or warehouse receipts, and some \$10,000.00 in bad checks which was to cover the \$28,000.00 described here.

Q. Was this understanding ever reduced to writing in any way other than by this unsigned letter?

A. No, sir. No, not to my knowledge.

Q. Did you ever get that letter back signed?

A. No, sir, I did not.

Q. And you say you never got back any of the bad checks?

A. I did not. On several occasions I requested *him* and Mr. Hunter said he would send them up.

Q. And do you know where they are now?

A. I do not, sir.

Q. Mr. Elliff, after Mr. Ramsey had inspected these documents, what did you do with them then, these documents being the note and the trust agreement?

A. The signed copy I took with me, but I left him a copy.

(Testimony of George F. Elliff.)

Q. Left whom a copy? [118]

A. Mr. Ramsey.

Q. You took the signed copy of what with you?

A. Signed copy of the trust agreement that Mrs. Lannin and myself had signed and Mr. Pasquinelli, one copy. I think we had three signed copies. We had all signed and kept a copy.

Q. And what did you do with the note?

A. Oh, the note I took with me to Los Angeles.

Q. I see. So then you left with Mr. Ramsey a copy of the trust agreement and you took the original of the note and the original of the trust agreement with you to Los Angeles, am I right?

A. I took a copy, not the original, because I kept, I think, the only signed copy I had. But I did have a copy unsigned.

Q. I see. Now did you show Mr. Ramsey on the occasion of this last conference with him the signed copy of the trust agreement?

A. Yes. Yes, I did.

The Court: Well, somebody had to get the signed copy of the note, didn't they?

Mr. Jacobs: Yes, sir.

The Witness: Mr. Hunter got the signed copy of the note, sir.

The Court: You delivered that to him in Los Angeles?

The Witness: Yes, sir. [119]

Q. (By Mr. Jacobs): Now at the time when you delivered the note to Mr. Hunter in Los Angeles,

(Testimony of George F. Elliff.)

what did you do with the copy of the trust agreement that you took there?

A. I enclosed the letter, the note and a copy of the trust agreement in a large manila envelope and left them at his door in Bel Air, California, I think it was.

Q. Well, leaving something at his door is a little bit vague, is it not?

A. I left it with the maid. Mr. Hunter—it was early in the morning—Mr. Hunter had not gotten up yet. I left it with the maid and she assured me that he would get it when he got up.

Q. Now were you alone on that occasion or was there anyone with you?

A. Mr. Baum was with me again.

Q. He was with you? A. Yes, sir.

Q. By the way, approximately what date was this delivery made to Mr. Hunter?

A. It was on the Sunday morning following the signing of this agreement.

Q. Since we have not a calendar on hand can you tell us approximately how many days after this occurred, after your interview with Mr. Ramsey?

A. Three days and four days at the very most.

Q. Now excepting the warehouse receipts which I mentioned in the trust agreement, as you recall, what was done?

A. They were in turn signed——

Q. I should rephrase that question because it's misleading.

(Testimony of George F. Elliff.)

Respecting the warehouse receipts that you have referred to in your own testimony previously that were held by the old firm, what was done with those subsequent to your delivery to Mr. Hunter?

A. They were in turn, I think it was possibly a week later, mailed to Los Angeles to Douglass Guardian in San Francisco and in turn reissued on new receipts to Mrs. Lannin.

Q. Now to whom were those new receipts delivered?

A. I believe to Mrs. Lannin's attorney, Mr. Robidoux.

Q. Did you handle them at all?

A. No, sir.

Q. I see. On what date did this trust agreement go into effect? A. October 8th, I believe.

Q. As soon as it was executed. When did Mr. Pasquinelli take over as trustee?

Mr. Shapro: I will object to the question if your Honor please on the ground that it calls for the opinion and conclusion of the witness.

Mr. Jacobs: The document doesn't say when the thing was actually put into effect. The document is the best evidence. [122]

Mr. Shapro: The obligation or——

Mr. Jacobs: Let me rephrase my question.

Q. When did you start to function under this trust agreement?

A. On about the 10th or 11th, I believe, was the first money received. And that is what we used to start the trustee account. So it was on Monday or

(Testimony of George F. Elliff.)

Tuesday after the agreement had been signed in October of '53.

Q. Was that before or after the warehouse receipts came into Mrs. Lannin—I mean came in from the old firm and were reissued to Mrs. Lannin.

A. It was before, I am quite sure.

Q. I see. First you said about the 10th or 11th and then you said Tuesday or Wednesday?

A. Well, I believe the 11th was about Tuesday or Wednesday.

The Court: The 11th was a Sunday, '53, October '53.

The Witness: Well then, it had been about the 13th. It was on my return from Los Angeles that we started the trustee account at the Anglo Bank.

Q. (By Mr. Jacobs): Let's get the dates of this trust in mind. How long did Mr. Pasquinelli serve as trustee?

A. I don't recall. I know it was in the Spring of '54.

Q. And did the trustee terminate—withdraw that question.

Was anyone appointed to succeed him? [122]

A. Yes, there was.

Q. Who was appointed to take his place?

A. Mrs. Barnhart.

Q. Was any new document executed at that time to evidence this change of trustees?

A. Yes, there was.

The Court: I think it might be convenient to

(Testimony of George F. Elliff.)

take a recess at this time. We will recess until ten o'clock tomorrow morning.

(Thereupon the Court recessed until 10:00 o'clock a.m. the following morning.) [123]

Tuesday, November 22, 1955

10:00 O'Clock A.M.

GEORGE F. ELLIFF

a witness called on behalf of the plaintiff, previously duly sworn, testified as follows:

Further Redirect Examination

Q. (By Mr. C. Huntington Jacobs): Mr. Elliff, you told us yesterday that during the month of March, 1954, as I recall it, a new trustee was appointed to act under this trust agreement that is in evidence? A. Yes, sir.

Q. Who was that? A. Mrs. Barnhart.

Q. Will you give her full name?

A. Juanita Barnhart.

Q. And how long did she serve as trustee under that agreement? A. Until July, I believe.

Q. Until July? A. Yes, sir.

Q. Bearing that in mind, the fact that this—admittedly this bankruptcy proceeding was started on July 10th, 1954, how long before that was it that she ceased to act?

A. She acted up until the end.

Q. She acted until the end? [125]

A. Yes, sir.

Q. Until July 10th? A. Yes.

(Testimony of George F. Elliff.)

Q. I see. Now when she resigned, what became of the fund?

Mr. Shapro: If your Honor please, just for the purpose of the record I would like it understood that the testimony concerning this alleged successor trustee is subject to the same motion to strike as your Honor made the evidence with respect to the original trustee. In other words, we have objected upon the grounds that since we were not parties to the trust agreement and no showing has been made that we were parties to the substitution of the trustee, that we are not bound by it.

The Court: Well, if you are not bound by it, you are not bound by it. It is in the record. I don't know whether I am going to strike it or not. We will wait and see what happens.

Mr. Shapro: I appreciate that your Honor is not ruling on it. I merely wanted it understood that it is being admitted subject to a motion to strike, which your Honor will consider when and if——

The Court: Well, we will see. I don't approve of proceeding on a general motion to strike. If you have something to offer and want to strike some particular thing—but I haven't heard anything about this until now and we have [126] proceeded quite a bit. I have it here that Mrs. Barnhart was appointed to succeed and the new document was executed. That was gone into yesterday.

Mr. Shapro: That is right.

The Court: My notes say so.

Q. (By Mr. C. Huntington Jacobs): Now, Mr.

(Testimony of George F. Elliff.)

Elliff, when Mrs. Barnhart resigned or ceased to act as trustee, what was done with the funds of the trust, if there were any?

A. The balance that was left in the bank went to pay off the taxes that were owed by the Pine Supply Company.

The Court: What kind of taxes?

The Witness: Sales taxes, withholding taxes on employees and old age and social security.

Q. (By Mr. C. Huntington Jacobs): During the term of the trust, I take it that it was all one trust, this substitution of trustees was simply a continuation of the trust under another trustee, am I right? A. That is correct.

Mr. Shapro: To that question, I object.

The Court: Sustained.

Mr. Shapro: It calls for the opinion and conclusion of the witness.

The Court: Sustained. The answer may go out.

Mr. C. Huntington Jacobs: All right.

Q. During the period from the time when Mr. Pasquinelli [127] took over as trustee until Mrs. Barnhard ceased to *ask*, did you ever make any requests of the trustee in office regarding the issuance of checks? A. Yes, I did.

Q. I hadn't quite completed my question.

A. Pardon me.

Q. Did you ever make any requests that were not complied with by the trustee?

A. Only if funds weren't available.

Q. And you spoke of one term yesterday, of

(Testimony of George F. Elliff.)

one term of the trust that was not observed entirely, regarding the issuance of checks by yourself against funds deposited in your account by the trustee. Was the twenty per cent provision in the trust; you know what provision I mean, do you not?

A. Yes, sir, it was.

Q. Was that observed throughout the period I have mentioned?

A. Absolutely.

Q. Mr. Elliff, you told us yesterday something about the assets you had and the debts you owed at the time when you took over from Mr. Hodes—I mean from the Hodes Elliff partnership. Now I want to call your attention to the times at which you told us you took inventory with Mr. Ramsey of the business and examined the records of the business. That, I think, you said was in September of 1954?

A. '53, sir. [128]

Q. '53?

A. Yes, sir.

Q. '53? Yes. Can you tell us what the stock in trade of the business consisted of at that time?

A. Not accurately, sir, no.

Q. Well, what was the nature of it?

A. I don't recall any of the figures. Mr. Baum—

The Court: You are not asking for figures, I believe, are you?

Mr. C. Huntington Jacobs: No, sir.

Q. I am asking you what kind of stuff you had as stock in trade?

A. As stock in trade we had pine lumber and moldings, plywood, and some doors at that time.

(Testimony of George F. Elliff.)

The Court: And some what?

The Witness: Some doors.

Q. (By Mr. Jacobs): Now, what in your opinion was the reasonable value of that stock in trade at that time?

A. It would be a rough estimate, but I would say twenty thousand or better.

Q. Well, how much better, can you give us a maximum?

A. It wouldn't exceed twenty-five, I don't believe, sir.

The Court: What?

The Witness: It wouldn't exceed \$25,000.00.

Q. (By Mr. Jacobs): Now, what other property did you have at [129] that time, physical property?

A. Only the lot on Mount Hamilton Road.

Q. Did the business have any equipment?

A. It had a truck and a fork lift, yes, sir.

Q. And what in your opinion was the reasonable value of the equipment?

A. Oh, the equity in both might have amounted to \$2,000.00.

Q. And by equity, what do you mean, explain that.

A. The money that we put in, down payments and the payments we made against the balance owed.

Q. And what in your opinion was the value at that time of the lot that you referred to?

A. \$2,500.00, I'd say.

(Testimony of George F. Elliff.)

Q. And at that time how much money in the aggregate did you owe approximately?

A. I don't think I'd miss it far by saying fifty thousand dollars.

Q. Now did any of that \$50,000.00 include obligations of that partnership, the Hodes Elliff partnership I mean?

A. Not in September, no, sir. It did in—it did in this sense that I had taken over certain liabilities from Mr. Hodes that hadn't been liquidated. But as far as the partnership dissolution, I believe I paid him off in August or July.

Q. You mean you had paid Mr. Hodes but there were still obligations of the business, of the partnership business, that [130] you had not paid, is that right?

A. That is correct.

Q. Can you approximate the amount of those?

The Court: I don't understand that. If there are some detailed figures of what they are or how they are made up, counsel, I would rather have it. I don't know what you are talking about, obligations of a business. Now I don't know what business it is. He said that he took over from Hodes. I don't know what you are talking about.

Mr. Jacobs: Oh.

Q. Mr. Elliff, you had been in business with Mr. Hodes?

A. That is correct.

Q. Now what was the nature of that business in which you were engaged with Mr. Hodes?

A. Pine lumber and moldings.

Q. And was it different from the business that

(Testimony of George F. Elliff.)

you were conducting in September of 1953?

A. No, sir, no difference.

Q. Same business? A. Same business.

Q. And you told us that when you dissolved this partnership you took over its liabilities—I mean you undertook to pay them?

A. Right, I did.

Q. Without any contribution from Mr. Hodes?

A. That's correct.

Q. And I am asking you now if you can approximate the amount of those partnership obligations which you undertook at the time of dissolution of the partnership which had still not been discharged in September of 1953?

A. I'd say between five and eight thousand dollars.

The Court: Well, Mr. Elliff, when you were in business with Hodes weren't you operating under the name of Pine Supply Company?

The Witness: Abbott Lane Pine Supply. We dropped Abbott Lane Supply—

The Court: And you had used the name Pine Supply before Hodes had left, hadn't you?

The Witness: Only for a month.

The Court: And you continued on with the name of Pine Supply. Now how did you distinguish the obligations of Pine Supply before that time and after that time? Weren't they all the obligations of that same company?

The Witness: Well, we chopped it off when Hodes walked out or when I bought him out. And

(Testimony of George F. Elliff.)

from there on he was no longer obligated for any liabilities of the company.

The Court: But you were?

The Witness: I was, yes, sir.

The Court: But as far as your creditors were concerned, weren't you doing business under the name of Pine Supply Company? [132]

The Witness: Abbott Lane Pine Supply is where the obligations fell under the name.

The Court: Well, if there is some distinction there, counsel, I think it should be brought in to know what it is.

Mr. Jacobs: The sole purpose of this, your Honor, is to show the fact that some of these obligations which appeared on their books in September when this inventory and this examination of the records was made, had been outstanding since the days of the partnership, quite a considerable period of time.

The Court: All right, if that is the purpose of it I will——

Mr. Jacobs: Yes, sir.

Q. Now when did you start this business with Hodes? A. November 1st, 1952.

Q. And did these obligations that you undertook and had not discharged in September of 1953 include any that were incurred during the Fall of 1952?

A. No, sir. The Winter and Spring of 1953, I believe, would be correct.

Q. I see. Now did you ever discharge all of

(Testimony of George F. Elliff.)

those old obligations that had been undertaken by you at the time of dissolution; did you ever discharge them all? A. No, sir, I didn't.

Q. Some of them are still outstanding, is that correct? A. That's right. [133]

Q. And what were they, what were they for?

A. Lumber, purchase of lumber. I don't think there is anything outside of lumber.

Q. In fact, how much if any of the eight or nine thousand dollars of obligations you have just referred to have ever been discharged?

The Court: Did he say eight to nine thousand dollars?

Mr. Jacobs: That was my understanding.

The Court: I have five to eight.

Mr. Jacobs: I stand corrected. I am sorry, a lapse of memory.

The Witness: The figure that I remember is \$4,200.00 that wasn't——

Q. (By Mr. Jacobs): \$4,200.00 that was not?

The Court: Was not?

The Witness: Discharged at the end of the operation.

Q. (By Mr. Jacobs): And that is still outstanding? A. That is, they are.

Q. Those debts are still outstanding?

A. They are.

Q. Mr. Elliff, subsequent to the October transaction that you have described, the execution of the note and of the trust agreement and the turning over of the trust receipts of the warehouse receipts,

(Testimony of George F. Elliff.)

subsequent to that did you continue that business?

A. I did.

Q. Did it ever make any money after that?

A. No, sir, I don't believe it did.

Q. Under your trust agreement, twenty per cent of the gross proceeds, as I understand your testimony, and the agreement, was reserved to make payments on account of this note? A. Correct.

Q. For \$28,000.00? A. Correct.

Q. Was the remaining eighty per cent sufficient to pay the running expenses of the business, current expenses of the business?

A. No. The twenty per cent was the gross profit that we could realize out of the sale of the material.

The Court: Read that.

(Answer read.)

Q. (By Mr. Jacobs): Do you mean that the twenty per cent represented the entire gross profit of operation? A. Just about.

Q. You did, however, continue the business for some time after the October transaction, you said. How long did you continue it?

A. Until the end of June, if I am correct, 1954.

Q. During that period of time did you make purchases of inventory—I mean purchases of merchandise for your inventory? [135]

A. Yes, I did.

Q. When I say inventory, I mean stock in trade. Is your answer still the same? A. Yes.

Q. And what did you do with the stock in trade, as you bought it?

(Testimony of George F. Elliff.)

A. I put it in the warehouse receipts.

Q. And what instructions did you give the warehouseman when you did so?

Mr. Shapro: If your Honor please, I object to that question upon the ground it is hearsay, self-serving and not binding on Twin City Lumber Company.

The Court: What is the purpose of it, counsel?

Mr. Jacobs: To show that the agreement was executed, your Honor, the agreement required that they—that all inventories then on hand or thereafter required those to be represented by warehouse receipts which were to be given to Mrs. Lannin.

Mr. Shapro: But the receipts were to go to Mrs. Lannin, not to Twin City.

The Court: All right, go ahead.

The Witness: I instructed her upon receipt of invoice to make out the necessary non-negotiable paper on Douglas guardian, non-negotiable paper, and to send them to San Francisco [136] which we always did.

The Court: Wait a minute. I don't quite understand your answer. Will you keep your voice up?

The Witness: I am sorry. I have a paralyzed nerve.

Q. (By Mr. Jacobs): You were in an automobile accident, were you not? A. That's right.

Q. And it resulted in an injury to your neck?

A. Right.

Mr. Jacobs: I merely mention that by way of explanation, your Honor.

(Testimony of George F. Elliff.)

The Court: All right.

Q. (By Mr. Jacobs): Will you give us that answer again, Mr. Elliff, specifying whom you mean by her?

The Court: The question was, what instructions did you give the warehouseman. Answer that question if you will.

The Witness: Well, as you are well aware, the warehouse people insist or demand that there is a custodian on the property at all times, which is in their employ.

The Court: Yes.

The Witness: And that is called a field warehousing manager of which we always had one, a bonded representative of Douglas guardian which was Mrs. Barnhart also. She was always instructed by me to take the invoice which gave her the tally, the amount of each item that came in. And that was [137] counted and listed on their warehouse receipts. In turn, it was sent in to San Francisco and in turn I suppose it came up to Mrs. Lannin in the form of non-negotiable receipts.

Q. (By Mr. Jacobs): Did Mrs. Barnhart serve you in any other capacity at this time?

A. She did the invoicing, kept the books.

Q. Was she also your bookkeeper?

A. Yes, sir.

Q. And how was her salary paid?

A. By the Douglas Guardian Warehouse people.

Q. And who supplied the money for that?

(Testimony of George F. Elliff.)

A. They would bill me monthly, I believe, or semi-monthly.

Q. For the amount of her salary?

A. Yes, sir.

Q. You say that you continued business until sometime in June of 1954? A. That is right, sir.

Q. Was there any particular occasion for your ceasing business?

A. I was attached by Harbor Plywood Corporation.

Q. Was a keeper put in charge? A. No, sir.

Q. Was that the only attachment?

A. More followed, but that was the first one.

Q. That was the first one? [138]

A. That was the first one.

Q. And what was it that was attached?

A. The entire stock in trade.

Q. The business did not operate after that, right? A. No, sir, it didn't.

Q. Now Mr. Elliff, when that attachment was levied, do you know what, if any, assertion was made of Mrs. Lannin's rights of the trust agreement?

Mr. Shapro: If your Honor please. I am going to object to the question on the ground that it calls for the opinion and conclusion of the witness. It calls for hearsay. The best evidence of any action would be documents, whenever they were filed.

Mr. Jacobs: I don't see that counsel's objection can be sound, your Honor. I asked the witness whether he knew of his own knowledge was there

(Testimony of George F. Elliff.)

any assertion that was made of her rights.

The Court: He could answer that yes or no.

Mr. Jacobs: That's all.

The Court: All right.

The Witness: Yes.

Q. (By Mr. Jacobs): You do? A. Yes.

Q. How do you know? A. I was present.

Q. You were present?

A. When the Sheriff led the attachment and when Mrs. Barnhart refused him entrance to the warehouse.

Q. And were you also present in Court on any proceedings that were taken in connection with the trust agreement? A. I am quite sure I was.

Q. When did those proceedings take place?

Mr. Shapro: I submit, if your Honor please, and object upon the grounds that the record, the Court record, if there was a Court proceeding, is the best evidence.

The Court: Well, we are not going into what happened. He just asked when it was, when the Court proceedings were.

The Witness: October, I believe, 1954.

Q. (By Mr. Jacobs): In October?

A. To the best of my recollection. Maybe I misunderstood the question.

Q. Do you know what a third party claim is?

A. Yes, sir.

Q. Was any made by Mrs. Lannin, to your knowledge?

Mr. Shapro: I object to that upon the ground

(Testimony of George F. Elliff.)

that the documents of the Court would be the——

The Court: Sustained.

Q. (By Mr. Jacobs): May I have a moment to consult my notes?

When did you employ Mr. Baum as auditor?

A. In May of '53, I believe. [140]

Q. Did you supply to Mr. Baum all of the records of the business? A. I did.

Q. Did you supply to him also the records of your private affairs, I mean, your financial affairs extraneous to the business?

A. Not in writing, but verbally I am quite sure I did.

Q. You have already answered that you told us that you had employed him to audit the account between yourself and Mr. Hodes and——

A. We set up a set of books for Pine Supply Company.

Mr. Jacobs: I see. I think you can have the witness.

The Court: It is entirely up to you gentlemen, of course, but some suggestion was made yesterday about calling Mr. Baum. You couldn't finish with him in the afternoon. I wondered whether you wanted to defer your cross examination at this time until after Mr. Baum.

Mr. Shapro: That would be agreeable.

The Court: If you start now you may be able to finish Baum.

Mr. C. Huntington Jacobs: Yes, your Honor. If it will help Mr. Baum and facilitate matters, I

am perfectly willing to do that and I am sure Mr. Baum would appreciate that.

JOE N. BAUM

a witness called on behalf of the plaintiff, being first duly [141] sworn, testified as follows:

Direct Examination

Q. (By Mr. C. Huntington Jacobs): Please state your name and occupation for the record.

A. Joe N. Baum, B-a-u-m. I am a Certified Public Accountant.

Q. Where do you practice as such, Mr. Baum?

A. San Jose, California.

Q. You are of course duly licensed under the laws of California as a Certified Public Accountant?

A. I am.

Q. And you have heard the testimony of Mr. Elliff?

A. I have.

Q. And you were licensed as such, I take it, during the period he has mentioned of your employment by him?

A. Yes.

Q. Did you receive from Mr. Elliff at the time of your employment subsequently the records of the business known as Pine Supply Company?

A. I did.

Q. And by the way, what is your recollection as to the date of your employment?

A. It was either around the latter part of June or the beginning of July.

Q. I see. A little later than he indicated.

The Court: What year? [142]

The Witness: 1953, sir.

(Testimony of Joe N. Baum.)

Q. (By Mr. Jacobs): And what were you employed to do?

A. I was employed to do three things. First to set up a system of records keeping for the present Pine Supply Company, of which he was the sole owner. Secondly, to go back and determine what equities were his or his equity was in the business at the time he commenced operations. Third, to audit the records of the partnership to determine whether the price paid Mr. Hodes was correct as per the terms of the dissolution agreement.

Q. I don't quite understand when you say whether the price was correct.

A. According to my recollection, the dissolution agreement stated that a certain consideration was to be paid to Mr. Hodes at the time, but that the records and affairs of the partnership were subject to audit. And at that time the audit was complete. Any adjustment that would have to be made would be made at that time.

Q. Now did Mr. Elliff to your knowledge subsequently pay the price to Mr. Hodes?

A. Yes, he did. I think in the final settlement there was a reduction in the amount of the consideration that amounted to between three and four hundred dollars.

Q. What altogether did Mr. Elliff pay Hodes according to the records that you examined under your personal knowledge? [143]

A. It was in the neighborhood of \$5,000.00 or more.

(Testimony of Joe N. Baum.)

Q. Now did you examine the records of that partnership to determine what assets it had and what liabilities at the time of the dissolution it had?

A. Yes, I did.

Q. And what was your finding regarding its net worth at the time——

Mr. Shapro: I object, if your Honor please, upon the ground that the records of the business would be the best evidence. In other words, the opinion of the witness with respect to net worth is not in evidence. The evidence is what were the assets and liabilities as he found them.

Mr. Jacobs: May I suggest that with the taking of a long and involved and intricate account would be involved and the Court has before it an expert witness who has examined the accounts, as this witness says he has done. This may be taken by the Court and it may be contradicted later if the opposing party wishes to do so by the records themselves.

The Court: My recollection is that people of this profession have records and balance sheets. Why not have them if they are here?

Q. (By Mr. Jacobs): Have you them?

A. I brought with me the final partnership income tax return which was submitted.

Q. Did you prepare it? [144]

A. I did. I have the pencil copy from my work papers there.

Q. Do you have the work sheets with you?

A. Yes, I have.

Q. And where is that document? This is your

(Testimony of Joe N. Baum.)

draft, is it? A. Yes, it is.

Q. Now specifically this document you are showing me is what, for the record?

A. It is a pencilled copy of the Federal Income Tax partnership return which was filed sometime in the latter part of 1953 which represents the operation and the closing balance sheet of the Hodes-Elliff partnership as of the date of dissolution. And my date—from the record I could examine it—the partnership terminated on or about May 20th of 1953. And on the back of the income tax return is a balance sheet which shows the equities of the two partners at that time.

If I might add, Mr. Jacobs—this is also for Mr. Shapro—any figure with a parentheses around it means a minus or a deficit account.

Mr. Shapro: I understand.

The Court: Mr. Shapro is an expert upon deficit accounts.

Mr. Shapro: That is a dubious distinction.

Q. (By Mr. Jacobs): Well, so that this may be more specifically described, I take it that what you handed me here is a pencilled copy of the balance sheet which formed part of [145] that income tax return, is it not?

A. Well, there is a separate schedule that goes with it. The income statement which I can get for you, and if you want attached to it——

Q. Have you got it with you?

A. I will find it. I just grabbed these files out of the office late last night.

(Testimony of Joe N. Baum.)

Q. Does that make any change?

A. No, sir. All in the schedule would be the income statement which ties into the tax return. That is all.

Mr. Shapro: If it was part of the tax return, I think we should have it all.

Q. (By Mr. Jacobs): Now what I am holding here, I take it, Mr. Baum, is a pencilled copy of the balance sheet forming part of the return, also of the reconciliation of partners, capital account?

A. That's right.

Q. And the partners' share of income credits together with a statement of the income of the partnership during the period of its operation?

A. That is correct.

Q. And these you compiled from the records of the partnership, is that correct? A. Yes, sir.

Mr. Jacobs: I offer this in evidence as Plaintiff's [146] next in order.

The Court: Exhibit 9 in evidence, Plaintiff's Exhibit 9.

(Thereupon the foregoing document was introduced and marked as Plaintiff's Exhibit No. 9 in evidence.)

Q. (By Mr. Jacobs): Now from these figures which you compiled, Mr. Baum, are you able to tell us what the net worth of that partnership was at the time of dissolution? A. Minus \$2,208.18.

Q. Now did you also examine the records of Mr. Elliff's assets and liabilities extraneous to the Pine Supply Company? A. Yes.

(Testimony of Joe N. Baum.)

Q. You did? A. Yes, I did.

Q. And have you compiled figures showing that Mr. Elliff's assets and liabilities were altogether, both extraneous and in the business at the time of dissolution of that partnership?

A. No, I did not.

Q. Do you know what the assets and liabilities of the Pine Supply Company were at the time mentioned by Mr. Elliff when Mr. Ramsey examined the records of the company?

Mr. Shapro: Your Honor, may I have the question read?

The Court: Read the question.

(Question read.)

Q. (By Mr. Jacobs): I am just asking him for yes or no. [147] Did you or don't you?

The Court: Wasn't that given in the evidence when Mr. Ramsey—

Mr. Shapro: Approximately September 30th, September 30th of '53.

Q. (By Mr. Jacobs): I will ask the witness some other questions to begin with and bring him to that point.

You say that you commenced your services as auditor of the business as I understand it in June or possibly as late as July, is that correct?

A. That's correct.

Q. And from then on until the 10th of July, 1954, did you serve as auditor of the business?

A. No, I did not.

(Testimony of Joe N. Baum.)

Q. Throughout what period or periods did you serve as auditor?

A. Oh, I didn't do any work on the Pine Supply Company books after making out Mr. Elliff's income tax return at the end of 1953 and setting up a new set of books for the beginning of 1954.

Q. You say you didn't do any work on the books. Who did keep the books after that time?

A. After that time, Mrs. Barnhart.

Q. Did you have any part in the operation of the business either as auditor or otherwise after that time? [148]

A. No.

Q. Did you visit the place of business?

A. Oh, once or twice.

Q. And did you take part in any of these negotiations that have been mentioned by Mr. Elliff in your hearing?

The Court: That is a pretty broad statement.

Mr. Shapro: That is a broad question.

Mr. Jacobs: I asked him if he took part in any of them.

Mr. Shapro: That is a pretty broad——

The Witness: Are you, Mr. Jacobs——

Q. (By Mr. Jacobs): I will withdraw it and ask you a more specific question.

Did you in company with Mr. Elliff have any conference with representatives of the Twin City Company or Twin City Lumber Company?

A. I did.

Q. And did you meet a gentleman by the name of Mr. Ramsey?

A. I did.

(Testimony of Joe N. Baum.)

Q. Now, did you have any conference with Mr. Elliff and Mr. Ramsey at the place of business of Pine Supply Company during the month of September, 1953? A. I did.

Q. Did you have some conference during which, or a series of conferences during which the records of the business were examined, records of Pine Supply Company? [149] A. Yes.

Q. Now when did that conference take place or that series of conferences?

A. It was in the latter part of September of 1953.

Q. Was there one conference or more than one?

A. Well, I distinctly remember one.

Q. And you say on that occasion the records were examined by the parties present?

A. That's right.

Q. Did Mr. Ramsey examine them again, then?

A. Yes, he did.

Q. Now, did the records at that time show the assets and the liabilities of the business?

A. At the time the books of account were not quite complete.

Q. In what respect were they incomplete?

A. Because—if I can explain it, it's a rather lengthy answer to the question.

When I was engaged by Mr. Elliff, he had no formal books of account at all either for the partnership or for the new business which he was operating himself.

And in order to establish a starting point I had

(Testimony of Joe N. Baum.)

to go back and try to accumulate all this information of what had happened before and at the same time set up a set of books and accounts that could at least accurately record the transactions that took place after Mr. Elliff ran the business himself.

And it was in September that some of those records were still missing. But there were records recording purchase of sales, cash receipts, and cash disbursements from the date that Mr. Elliff started to operate the business himself.

Q. I see. Now did the records completely show the liabilities of the business at that time?

A. Yes, they did.

Q. And did they completely show the assets of the business at that time?

A. Not completely, no.

Q. Well now, in what respect were they incomplete in showing the assets; what assets did they fail to show?

A. The assets that they failed to show were some of the accounts receivable that were taken over at the time that Mr. Elliff commenced doing business himself.

Q. Have you since found any of the records that you found to be missing at the time?

A. Well, the books were finally completed and tied up in time to complete the tax return for the year of 1953.

Q. I see. Now then what was the amount of the receivables that were—not that the business actually had—but that the records failed to show?

(Testimony of Joe N. Baum.)

A. Well, as close as I could compute them, they amounted to \$4,400.00.

The Court: What did? [151]

The Witness: The accounts receivable that were taken over from the partnership by Mr. Elliff operating as a sole proprietor.

Q. (By Mr. Jacobs): Was that the total that was taken over?

A. As close as I could determine, yes.

Q. And what did the books show at the time of this examination regarding the amount of the accounts receivable that had been taken over?

A. We, instead of examining the books, Mr. Jacobs, at that time we took every unpaid invoice and made a tape of them. We taped them up and also taped up the unpaid bills, as many as we could find that were on file on the company's premises.

Q. This is what you did at the time of this examination of the affairs of the business in September. Now, did you in that manner ascertain accurately at that time the liabilities and the assets of the business? A. We did.

Q. Although the books did not show them, the invoices accurately, the invoices that you used in compiling your account at that time did, is that your testimony? A. Yes, sir.

Q. What physically were the assets of the business at that time, what did they consist of?

A. They consisted of stock in trade; they consisted of two pieces of equipment, the fork lift and a Dodge flat bed delivery [152] truck; they con-

(Testimony of Joe N. Baum.)

sisted of some accounts receivable and a few pieces of office equipment.

Q. There was a stock in trade, I take it?

A. Yes, sir.

Q. And what did that consist of?

A. Pine lumber, pine molding, some doors and some plywood, and a few, possibly a few odd items of merchandise.

Q. Now, Mr. Baum, have you been engaged in any other business than the profession of accountancy? A. I have.

Q. What is that business?

A. For close to two years I was comptroller and general manager of a plywood manufacturing corporation and a sawmill corporation and a timber corporation.

Q. Where?

A. Northern California.

Q. Now how long prior to your services as auditor of this business were you so engaged?

A. My employment wound up possibly a year before I was employed by Mr. Elliff.

Q. Were you at the time of this examination familiar with the current values of the merchandise comprising the stock in trade, assorted merchandise that comprised the stock in trade of this Pine Supply Company?

A. Only to the extent that I saw the prices listed on the [153] invoices, Mr. Jacobs. I should add I knew about what plywood marketed for because I had made it and I had fairly well kept in touch

(Testimony of Joe N. Baum.)

with it. But I had never had anything to do with pine lumber or pine molding except from my experience with the Pine Supply Company.

Q. The invoices you have showed the prices that they had been getting for this merchandise, did they? A. Yes, sir.

Q. Now on the basis of what you knew about the market value of these items of merchandise, plywood and the rest of the lumber, can you tell us what the fair market value of it was at the time?

Mr. Shapro: I object to that question, if your Honor please, upon the ground that no proper foundation has been laid. The witness has said he is not qualified. If he wants to give the book figures I have no objection. But his opinion as to fair market value, I don't think he is qualified.

The Court: Do you have the figures from the invoice?

The Witness: I haven't got all the Pine Supply invoices here, your Honor.

The Court: Do you have a recapitulation of them?

The Witness: No, because the inventory figure that we took at the time was the inventory that was listed on the summary of the warehouse receipts. In other words, the warehouseman had to keep a perpetual inventory and rather than go [154] and take an actual physical account at that time, since time was rather urgent, we went and got the figures from the perpetual inventory that the field ware-

(Testimony of Joe N. Baum.)

houseman or the manager of the field warehouse kept, sir.

The Court: Do you have that?

The Witness: No, sir. They were never my property.

Mr. Shapro: May I ask a question at this point because maybe I am confused, certainly I could be. We are talking about the end of September. The field warehouse was started in May?

The Witness: That is right.

Mr. Shapro: And you never had the field warehouse certificates in your possession?

The Witness: No, sir.

Mr. Shapro: May I ask how you got the account on May 30th?

The Witness: The warehouseman had to keep a perpetual inventory of everything that came in and everything that went out of the warehouse. And so in September when we had to get an inventory figure, we went to that perpetual inventory, which was the property of the Douglas Guardian Warehouse Company. It was not mine at all.

Q. Did you make notes at the time of the figures?

A. No, because Mr. Ramsey had all those figures and he was using them for his own purpose to list assets, liabilities. [155]

Mr. Shapro: Thank you, your Honor.

Mr. Jacobs: I will withdraw the previous question.

(Testimony of Joe N. Baum.)

Q. Do you remember approximately what that figure was?

A. It was in the neighborhood of \$25,000.00.

The Court: That's of the merchandise that was in the warehouse?

The Witness: Yes, sir.

Mr. Jacobs: Q. Now what was the markup that you observed from the invoices?

A. Well, there was no constant markup, Mr. Jacobs. First of all, especially in the matter of plywood where there was a fluctuating market price; one would like to mark it up say $33\frac{1}{3}$ per cent or 30 per cent. But sometimes the actual economic conditions make you sell things like that at little above cost.

Q. On the basis of the invoices they had been rendering for this merchandise, what was their average markup, what did they take?

Mr. Shapro: If you know.

Mr. Jacobs: Q. If you know.

A. If I remember correctly, it was between twenty and twenty-five per cent.

Q. Did the books show whether the truck—I think you said the flat bed trailer——

Mr. Shapro: Lift. [156]

Mr. Jacobs: Q. Lift?

A. The fork lift and the—I can tell you that in a second, Mr. Jacobs. I brought the books of account with me. Yes, they did.

Q. They did? A. Yes, sir.

Q. Now, what was this truck?

(Testimony of Joe N. Baum.)

A. Oh, it was a Dodge, I think a 1951 Dodge truck with a 16 foot bed on it.

Q. And what was the price of it?

Mr. Shapro: You mean the cost price?

Mr. Jacobs: No. I am driving at the equity in it, if there was any.

Mr. Shapro: Well, your Honor, I don't think the witness is qualified. I object upon the ground that no proper foundation has been laid.

Mr. Jacobs: The books showed what the man agreed to pay for it.

Mr. Shapro: If the books have the figures, I will agree to it, your Honor.

The Court: What is the cost, you say? This was a '53 truck?

Mr. Jacobs: Yes, this was a '53.

The Witness: Yes, sir. The book value of the truck was \$3,685.02. [157]

The Court: That is the purchase price?

The Witness: Yes, sir, taking into account the trade-in that was traded in on an old Chevrolet truck, I think, was traded in at the time.

Mr. Jacobs: Q. And how much, if anything, was owing upon it, referring to this time of this examination? A. Roughly \$2,900.00.

Q. Was this a flat bed trailer or separate from the truck, did you say?

A. No. The truck was a delivery truck with a cab and then a flat bed.

Q. And that's all included in the price, indebtedness that you have mentioned? A. Yes.

(Testimony of Joe N. Baum.)

Q. Now then there was also a lift?

A. Fork lift.

Q. And what was the book value of that at the time? A. \$3,399.00.

Q. And how much was owing on that at the time? A. About \$1,920.00, roughly.

The Court: When was that purchased?

The Witness: Approximately the same time, sir, about the beginning of May.

Mr. Jacobs: Q. I don't recall that you mentioned any other assets of this business or not. Were there any? [158]

A. Well, there was some office furniture.

Q. Was that given a book value, does that appear on the books?

A. There was roughly \$470.00 worth of furniture and fixtures. And then the counter that was built outside, that possibly could be moved, that cost \$87.55. So altogether there was about \$557.00 worth of other assets.

Q. Was there money owing on that?

A. At the time I think the desk and the—there might have been \$150.00 owing on the desk and the other office equipment.

Q. How about lighting fixtures and so on?

A. They came with the establishment, such as they were.

Q. I see. Elliff didn't own them? A. No.

Q. And the furniture was paid for, was it, except for the——

A. I am talking about the office furniture, a

(Testimony of Joe N. Baum.)

desk and a couple of chairs, it ran about \$150.00 or something like that.

Q. Now what were the liabilities of the business at the time, the debts of the business at the time?

Mr. Shapro: Your Honor, I hate to interrupt counsel, but we don't have the accounts receivable. We are getting into liabilities and the assets aren't finished.

Mr. Jacobs: Q. I thank counsel for the suggestion; yes, we should cover that. What were they; what was the face [159-A] amount of the accounts receivable at that time?

A. I would say that as of the end of September the accounts receivable were in the neighborhood of \$25,000.00.

Q. Now, can you give those—can you segregate those by date?

A. Well, the only way I can segregate them by date—

Q. Ninety days?

A. The sales in September were roughly \$13,000.00; the sales in August were roughly \$17,500.00; and the sales in June—I mean in July were roughly \$13,000.00.

Now you could say that at least \$10,000.00 or \$11,000.00 of those receivables were September receivables and approximately twelve or \$11,000.00 because some of Mr. Elliff's customers were rather slow in paying. And the balance went back, July, and some even tag on until June and May.

Q. Some of them even in June and May?

(Testimony of Joe N. Baum.)

A. Yes, sir.

Q. Can you approximate the amount of the May receivables?

A. Well, the only way I can approximate that now is because at the end of the year we set up a reserve for bad debts in the amount of \$1,886.00, which would represent most of the bad debts that existed prior to September 30th because there weren't very many after that. He was a little bit more careful with whom he did business with.

Q. Now when if at all did you again examine—after your [159-B] employment as auditor terminated—when did you again examine the accounts of the business?

The Court: Well, now you haven't finished.

Mr. Jacobs: I haven't got to liabilities.

The Court: Let's take a recess at this time and go into the liabilities after.

(Recess.)

Mr. Jacobs: Q. Can you tell us, Mr. Baum, what the business owed at the time of this examination of its affairs in September?

A. It was in excess of \$50,000.00.

Q. Can you give us the exact figure or approximate it?

A. Yes. Approximately there was roughly \$28,000.00 owed to the Twin City Lumber Company. The others payable, I'd say, were in the neighborhood of \$12,000.00 or \$13,000.00, something like that. The unpaid balances on the equipment contracts were in excess of \$4,000.00 and at that time, just

(Testimony of Joe N. Baum.)

on the business operation of the Pine Supply business by Mr. Elliff as the sole proprietor, he owed his mother-in-law, Mrs. Lannin, \$7,000.00.

Q. Now have you enumerated all of the liabilities that have appeared on the records of the business?

A. Those were the only liabilities that would appear on the company records. Any sums that he might have borrowed from other people and [159-C] not deposited and that I had no knowledge of would not appear on the books of the account for the Pine Supply business.

Q. What part of the liabilities of the business at that time consisted of debts that had originally been contracted by the Elliff Hodes partnership?

A. I think they were in the neighborhood of \$5,000.00.

Q. And are you able to tell us the date of the earliest indebtedness of that category?

A. No. I can't tell from my records but I know from examining some of those invoices that they dated back as far as the beginning of the year, 1953, I would say in January or February.

Q. And can you tell us how much of them dated back that far?

A. Oh, at least a couple of thousand dollars of that \$5,000.00.

Q. Did you do any work in connection with the financial affairs of the business subsequent to the end of the year, 1953?

A. Yes, I did.

(Testimony of Joe N. Baum.)

Q. Before we get to that, I should have asked you this.

Did you compile the records of the business as of the end of 1953? A. I did.

Q. And have you got your figures [160] representing that compilation? A. I have.

Q. Will you produce them, please?

A. I have a copy of the income schedule that was attached to Mr. Elliff's income tax return and the sheet. It shows a loss of \$7,603.30. This is a part of the schedule which has not been attached to it.

Mr. Shapro: Is there a balance sheet there?

The Witness: Yes. I think I have a copy of the year end balance sheet. If not, I know I have furnished Mr. Jacobs, C. Huntington Jacobs, with one.

Mr. Jacobs: Q. I will see if I have it. This is the income account, I take it, the document you are handing me here, this is your pencilled draft of the return? A. Of the return that I had typed.

The Court: Of what?

The Witness: Of Mr. Elliff's income tax return, sir.

The Court: For what period?

The Witness: For the calendar year 1953.

Mr. Jacobs: Q. This document which you have handed me consists of two pieces of paper, one the income tax form filled in in pencil and the other a typewritten schedule C?

A. That is correct. And did you ask for a copy of the balance sheet, Mr. Jacobs?

Mr. Shapro: I did. [161]

(Testimony of Joe N. Baum.)

The Witness: I have one right here. It shows a deficit in the capital account of \$17,103.00, sir.

Mr. Jacobs: Q. This income tax return and the Exhibit attached to it were compiled by you from the records of the business?

A. Yes, sir, they were.

Q. And also from Mr. Elliff's records. Does this include his income from all sources?

A. This only includes the income from the Pine Supply business from the date that he operated it as a sole proprietor. The other——

Mr. Shapro: You told the Judge it was for the calendar year 1953?

The Witness That's right. For the calendar year 1953, he operated the Pine Supply business as a sole proprietorship. His other income would be picked up from the amount of income that he would have to report from the partnership return, which I have just furnished you.

Mr. Shapro: So the record will be straight, your Honor, the income tax return—that is that part of the income tax return which Mr. Jacobs is now holding and to which is attached the document you prepared called Schedule C represents Mr. Elliff's income from the business of Pine Supply Company from the date of its inception as a sole proprietorship, which as I understand your testimony, was May 20th, 1953 to the end of the year? [162]

The Witness: That's right.

Mr. Jacobs: Q. That was my understanding. And it's true also of this as it was of the previous

(Testimony of Joe N. Baum.)

Exhibit, is it not, that the item that appears in parentheses or in these——

A. That is a deficit, a loss.

Mr. Shapro: I will be glad to stipulate to that, sir.

Mr. Jacobs: We offer this as the trustee's next in order.

The Court: Exhibit 10.

(The foregoing document was thereupon introduced as Plaintiff's Exhibit 10 in evidence.)

Mr. Jacobs: Q. Now what is this document that you are now examining, Mr. Baum?

A. This is a copy of a typed balance sheet that was furnished to Mr. Elliff upon his request showing his assets, liabilities, and net worth as of December 31st, 1953. It was furnished solely for his use and he was directed that it was not to be used for credit purposes or anything else. There is no mention on the balance sheet of the hypothecation on the inventory to secure the guarantee of the Twin City note.

In other words, it's just a statement of assets and liabilities. But it does not indicate that the inventory is secured or secures a guarantee of a debt.

Mr. Shapro: Just so we'll have the record [163] straight, by the securing of the guarantee of the debt, you mean Mrs. Lannin?

A. Yes. In other words, the inventory doesn't indicate that the inventory was warehoused or is subject to warehousing.

Mr. Jacobs: Q. Would this be a correct ex-

(Testimony of Joe N. Baum.)

planation of what you just said, that it does not for the reason you give, it does not reflect the trust agreement? A. No, sir, it does not.

Q. But it does show what assets the business had and what liabilities it had as of December 31st, 1953, isn't that correct? A. Yes, sir.

Mr. Jacobs: We offer this as trustee's next in order, trustee's Exhibit 11 in evidence.

The Court: Exhibit 11. Let me see that, please.

(Thereupon the foregoing document was introduced as Plaintiff's Exhibit 11 in evidence.)

Mr. Jacobs: May I see the last previous Exhibit.

(The Clerk hands Mr. Jacobs the last previous Exhibit.)

The Court: What are the fixed assets?

The Witness: They would be the fork lift, the truck, and the office furniture, fixtures, and equipment, sir.

The Court: And as against those fixed assets, your contracts payable mean the amount that is due on them? [164]

The Witness: Yes, sir.

The Court: Now you said a moment ago that—and I might preface it by saying that I can go so far with a Certified Public Accountant and then I get lost—I can go a little ways.

But you talked about there being an impairment of capital, \$17,000.00, what do you mean by that?

The Witness: In other words, sir, the book value of all the assets was less by \$17,000.00 at the end

(Testimony of Joe N. Baum.)

of the year than the book value of all the liabilities, the stated value of all the liabilities.

The Court: You mean that there was a loss? A loss during the year of \$17,000.00?

The Witness: Well, there was not only a loss during the year, but the capital was further impaired because Mr. Elliff had drawn approximately five thousand and some odd dollars out of the business for his own use.

The Court: Well then, you assumed that on May 20th he had a capital of \$2,500.00?

The Witness: Minus there were one or two other odd items that I had to uncover later that changed that figure slightly that I had showed from the partnership return here. But he started out the business with a minus or a deficit in his capital accounts. He lost money, approximately \$7,600.00 during the year.

The Court: And he drew \$5,900.00? [165]

The Witness: And he withdrew \$5,900.00.

The Court: And that is how you get \$17,000.00?

The Witness: Yes, sir.

Q. (By Mr. Jacobs): Do your records show month by month what the expense of the business was—I mean the Pine Supply Company as operated by Mr. Elliff as the sole proprietor? Do they show month by month what the expense of the business was in regard to earnings?

A. It does not.

Q. Well, neither of these records do. Do you have that information?

(Testimony of Joe N. Baum.)

A. No, sir, I don't, because as I stated before I actually started to work with the records some time—I am almost positive it was in July—and before we could get to the point where we could establish monthly earnings figures, I still had to go back and establish what Mr. Elliff started out with and at the same time was trying to work on the partnership records. So that the only thing that we used to do was at the end of the month, compare, take rough figures by comparing sales with what we knew were definite expenses such as payroll, rent, and things like that, and arrive at some sort of a tentative figure as to whether the business earned or lost money during the period.

Q. You did, however, do that?

A. Yes, sir. [166]

Q. Can you tell us during what months it made and during what months it lost money according to those figures?

A. The only possible times that the business could have made any money was July, August and part of September.

Q. And how much, if you were able to ascertain it, did the business make in July?

A. I don't have those figures, Mr. Jacobs, because they were all just done with Mr. Elliff and I sitting at a desk. But from my recollection the amount of money that could have been made during July was just a few hundred dollars at most, and I think during August it possibly made \$1,000.00 or more.

(Testimony of Joe N. Baum.)

Q. Well, can you fix a maximum amount?

A. Oh, I'd say twelve or thirteen hundred dollars.

Q. I see. And I think you said it might have made money during part of September?

A. Part of September. But then from the latter part of September on, the business was at a standstill because of the fact that there was a restriction, if I remember correctly, on the movement of inventory out of the place.

Q. Now how about the short balance of the month of May and the month of June?

A. In May the business lost money because of the fact that sales were only roughly \$2,465.00. Now that is just for the period of time that Mr. Elliff operated the business. If I remember correctly there was quite a bit of dissension between [167] the partners prior to that and I don't think that the sales amounted to very much for the partnership.

Q. Now as to the month of June?

A. The sales for the month of June were approximately \$6,500.00.

Q. And what was the profit, if any?

A. I wouldn't want to hazard a guess on it, but there was a loss.

Q. There was a loss? A. Yes.

Q. And can you approximate it?

A. No, I can't at this time.

Q. Subsequent to October 10th, 1953, what was the expense of the business?

A. In October, the sales were roughly \$3,060.00.

(Testimony of Joe N. Baum.)

Q. And they lost money?

A. Oh, I wouldn't know, but I would hazard a guess that it lost it.

Q. Well, what was the operating expense?

A. Well, when I speak about warehousing expense, I am speaking about the charges that Mr. Elliff would pay to the warehouse company which would include the salary of the bonded warehousemen.

Q. That was Mrs. Barnhart? ..

A. Whoever it might be, there were others, [168] if I remember correctly, than Mrs. Barnhart.

Q. Before her? A. Before her.

Q. And what was the operating expense then?

Mr. Shapro: For the month of October?

Mr. Jacobs: Yes.

The Witness: I have a record here of the bills from the Douglas Guardian for \$337.21. Warehouse salaries for the month of October were none. Auto and truck expense for that time were \$178.00, rent was \$252.00, travel expense for salesmen or Mr. Elliff, or for somebody to get out on the road and try to move the merchandise, was \$169.25.

The telephone bill during the month was \$227.82, stationery was \$1.03, insurance \$46.00 and a quarter, and interest and bank charges that were entered during the month came to approximately \$380.00.

Q. Have you enumerated all of the operating expenses?

A. I was paid \$300.00 in fees in October, mis-

(Testimony of Joe N. Baum.)

cellaneous expense amounted to \$60.00. Offhand I would say that those were substantially most of the operating expenses during the month.

Q. Now you haven't, I observe, included anything in the way of salary to Mr. Elliff. Was there any?

A. Well, in a sole proprietorship, Mr. Jacobs, you don't consider what the sole proprietor draws out. [169]

Q. I had in mind the terms of the trust agreement which you have read, have you not?

A. Yes. It allowed Mr.—if I remember correctly it allowed a drawing by Mr. Elliff of \$400.00 a month plus that the business was to pay for his automobile expenses and traveling around as part of the selling expense.

Q. Did he draw \$400.00 a month for that month or what did he draw, if anything?

A. In October I have two entries totalling \$9,-816.00 and fifty seven cents. But there are a couple of office receipts by journal entries amounting to a couple of hundred dollars which I had to check back and see what the entries are for.

Now it's very possible, as I say, that just because it's put in as his drawing account, it might have been put in for a specific purpose, because I do know that—this may be getting a little bit ahead of myself—I also had the records of Mr. Pasquinelli at the time that his capacity as trustee was terminated and for the period of time that Mr. Pasquinelli was the trustee, Mr. Elliff drew over that period

(Testimony of Joe N. Baum.)

of time substantially less than the \$400.00 a month average.

Q. What did he average?

A. I will see if I can get that, a copy of that audit. From October 8th, 1953 to March 23rd, 1954 Mr. Elliff drew the sum—the sum was charged to him of \$1,423.55. So you take October, November, December, January, February, times [170] five is that \$2,000.00. So his drawings for that period of time were substantially less.

The Court: I didn't get that. From what period?

The Witness: From October 8th, 1953, to March 23rd, 1954.

Mr. Jacobs: Q. What was the extent of the business in November, 1953?

I am not going too far with this, your Honor, I just want a couple of representative months.

The Witness: Well, you have got all the months so far. The sales for November of 1953 was \$7,-577.05.

Mr. Jacobs: Q. Did the business make money during that month?

A. I would have to hazard a guess and say no.

Q. Well, have you any figures showing what it spent during that time on current operations?

A. Yes, I do.

Q. Now don't give us unless counsel wants it in detail, but can you give us the over all figure?

A. No, I have to look at the individual ledger sheets, Mr. Jacobs.

(Testimony of Joe N. Baum.)

The Court: Counsel, you said he lost money in November. Now if counsel wants——

Mr. Jacobs: He said he would hazard a guess.

The Court: But he told us before he lost [171] money in November.

Mr. Jacobs: Q. All right. Did the business ever make any money during any month after October, according to its records, October of '53?

A. There again I would have to hazard a guess, Mr. Jacobs and say no, because after I prepared, you know, took the figures for the income schedule for 1953, the only other connections that I ever had with books of account were in the auditing of Mr. Pasquinelli's records, or else as you remember, when I checked with you about making Mr. Elliff's income tax return for 1954. And at that time, as I told you, the business, naturally, the business being taken away from, suffered a substantial loss for the year 1954. But I did not go back and analyze whether he had made any money month by month. I was just interested in tying matters up for the year.

Q. Well, you eventually did audit the records of the business just prior to this bankruptcy, did you not?

A. You mean did I actually physically audit them before he was put into bankruptcy?

Q. Yes. A. No. As I said——

Q. What did you do in that connection?

A. The last connections I had with Mr. Elliff,

(Testimony of Joe N. Baum.)

as a client, was that I prepared his 1953 tax return.

Q. I understand. [172]

A. And set up the books of account for 1954. And then it was a case of auditing Mr. Pasquinelli's records as trustee.

Q. And did you not prepare the records that were subsequently used in his bankruptcy?

A. No.

Q. You had no hand in preparing the schedules?

A. No. I am almost positive they were prepared by Mr. Pasquinelli.

Q. When the trustee in bankruptcy was appointed and qualified, he employed you, did he not?

A. He did.

Q. As an accountant. And did you not at that time examine the records of the business to determine—of the Pine Supply Company—and have Mr. Elliff personally determine what his financial condition had been at these various periods of time that we have just been mentioning?

Mr. Shapro: You mean month by month, the same months that you mentioned?

Mr. Jacobs: Yes.

The Witness: No, I did not determine them month by month.

Mr. Jacobs: Q. I see. Now were you advised at the time of the attachment that Mr. Elliff has mentioned which terminated the business, do you know about when it happened?

A. No. You mean the attachment of July 10th, around July 10th? [173]

(Testimony of Joe N. Baum.)

Q. In June of '54?

A. No, I was not notified at the time.

Q. Did you subsequently examine the records to determine what the condition—for anybody—determine what the condition of the business was at the time when it was closed down finally?

A. Yes, I did.

Q. Now, did you compile the figures showing the condition of the business at that time?

A. No. The only figures that I compiled and used were the ones which were used in compiling Mr. Elliff's income tax return in 1954.

Q. I see. Well now can you tell us whether the business made or lost money in 1954?

A. The business lost money in 1954.

Q. How did its expenses in 1954 compare with its expenses prior to October 6th, 1953?

A. It was not—the expense was not even as favorable.

The Court: When?

The Witness: In 1954, the expenses of the business was not as favorable as it was prior to October the—what did you say, October 6th?

Mr. Jacobs: Q. October 6th. A. 1953.

Q. You spoke of having attending conferences in the plural [174] between Mr. Elliff and representatives of Twin City Company? A. I did.

Q. Now what was the first of the conferences in that nature that you have attended and where was it?

A. Well, the one that I first definitely remember

(Testimony of Joe N. Baum.)

was the one that took place up in the Twin City Lumber Company offices in San Francisco.

Q. And when was that?

A. It was, as far as I can remember, it was in the latter part of August, 1953.

Q. Let me ask you, to carry your mind back to May of that year and specifically the first few days of May of that year.

A. I testified, Mr. Jacobs, that I was not employed by Mr. Elliff until——

Mr. Shapro: July.

The Witness: Until the latter part of June or the beginning of July, 1953.

Mr. Jacobs: Q. I see. So you did and you say that you attended the first of them that you can recall, you think, in August? A. Yes, sir.

Q. What part of August, so we can get a little more specific?

A. Oh, I am pretty sure it was the latter part of August.

Q. And who was there?

A. Mr. Ramsey was there, part of the time, I think, and Mr. Collins was there——[175]

Q. You are waving your hand back and forth, but that doesn't register on the record.

A. People were walking in and out of the little room we were sitting in. But I know very definitely that Mr. John Hunter was there.

Q. At all times? A. Yes, sir.

Q. And were the financial affairs of the business, of the Pine Supply Company, discussed on

(Testimony of Joe N. Baum.)

that occasion? A. They were.

Q. And what was said and by whom in that regard?

A. One of the subjects discussed generally was the inability of Mr. Elliff to make payments on his account on their due date.

At that time Mr. Elliff and I had been working on plans to——

Mr. Shapro: If your Honor please, we are asking for a discussion, not for a history.

The Witness: Well, this all goes into the discussion, Mr. Shapro.

Mr. Shapro: But your discussion—if I may make an observation, your Honor, the question called for what was said and by whom.

Mr. Jacobs: That is true, it did.

The Witness: All right. [176]

Mr. Jacobs: Q. Now were these matters that you have just mentioned discussed at that time, the history of the business in making payments to Twin City? A. That's right.

Q. They were? A. They were.

Q. Who brought up that point?

A. If I remember, Mr. Hunter did.

Q. I see. The experience that he had had in receiving payments from Pine Supply Company?

A. That's right. And I think one other thing was brought up was the fact that upon at least one occasion or more the checks which had been sent in by Pine Supply Company had been dishonored when they were presented to the bank.

(Testimony of Joe N. Baum.)

Q. Now, who spoke of that?

A. If I remember correctly, Mr. Hunter did.

Q. I see. Now what else was said and by whom regarding the financial condition of the Pine Supply Company?

A. I remember remarking to Mr. Hunter among other things that I would try to see that Mr. Elliff did not send him another bad check.

Q. Now was there any discussion at that time concerning any new arrangement or any arrangement for taking care of the indebtedness of Pine Supply Company? A. There was. [177]

Q. Twin City. And what was said in that connection at that interview?

A. Well, I remember telling Mr. Hunter that Mr. Elliff and I had been working on plans whereby we would put up the inventory which at the time was securing the Twin City account under the terms of this warehousing agreement and at the same time try to work out an arrangement where the accounts receivable of the business would be factored.

The Court: Would be what?

The Witness: Would be factored. In other words, they would be either sold to a financing agency with recourse in the accounts would be uncollectible or without recourse. And that then if we could make some arrangement with the Twin City Lumber Company and finance the stock in trade, which represented approximately the amount of money that Mr. Elliff owed to the Twin City Lumber Company, and pay in effect pay the accounts

(Testimony of Joe N. Baum.)

payable, as I like to call them, with a note that could be paid over a period of time, I think the business could develop enough volume to gradually bail itself out of the hole it was in. And since the prospects for business down in the San Jose area weren't particularly good, that the business could actually realize its potential.

Mr. Jacobs: Q. Is this what you told Hunter?

A. That was the general terms of the plan that I had outlined at that meeting. [178]

Q. And what was the occasion for your making these remarks to Mr. Hunter?

A. Well, as I say, Mr. Elliff and I went up to this meeting because of the fact that the Twin City Lumber Company at that time was very unhappy about Mr. Elliff's performance records as regarded payments.

Q. Well, was anything said at that meeting in the nature of a demand for payment by Mr. Hunter or by Mr. Ramsey or by Mr. Collins?

A. I can't remember who said what about a demand for payment. But the general impression that was given to Mr. Elliff and myself was the arrangements and more or less haphazard method of payment that was being paid up to that point was not going to be tolerated any further.

Q. Was anything said at that time about the continuation of the May agreement as to whether it was to continue in effect or was not?

A. Not as such.

(Testimony of Joe N. Baum.)

Q. What was said in that connection, if anything?

A. Mr. Elliff at the time had some—had a bank order of moving on file with the Twin City Lumber Company and he was informed—I don't remember which gentleman told him that, I think it was Mr. Hunter—that no further shipments were going to be made to him, that the order that he had on file at the molding mill was not going to be shipped until something else was worked out. [179]

Q. Now what was said about "Something else," was that defined?

A. It was Mr. Hunter himself, he did not define it.

Q. Who did?

A. But as I said before, when we were talking about this plan of possible consolidating all the debts and seeing if we could in effect finance the inventory, Mr. Hunter asked me how long I thought that it would take before we could possibly pay off this obligation. I remembered telling him three years.

Whereupon Mr. Hunter said they could not accept any longer payment than one year. I remember distinctly saying that if one year was all the time that Pine Supply Company could get, it was my recommendation that to my client to just wind up matters right then and there because it was a physical impossibility to pay off the amount owing to the Twin City Lumber Company in one year.

(Testimony of Joe N. Baum.)

Q. Have you told us all that transpired at that interview?

A. As much of it as I definitely can remember, Mr. Jacobs. The rest was just general discussion about the lumber business in general and the Pine Supply Company business conditions in particular.

Q. Was there any discussion about taking care of the bad checks that you referred to?

A. Well, at that time I think that all the checks that had been dishonored had been later on re-presented to the bank and honored. [180]

Q. Up to that time? A. Yes, sir.

Q. Now you continued as auditor of that business until the end of the year, I take it?

A. That's right.

Q. And tell us whether there were any other dishonored checks subsequent to that interview?

A. There were. There were several of them in September.

Q. Several in September? A. Yes, sir.

Q. Can you tell us the amounts of those? Of course, I am referring to checks that were given to Twin City Company.

A. These checks, as far as I could determine, were never honored. By honoring I mean solely being presented to the bank and payment being made on them. The disposition looks different.

The Court: Let's take a recess at this time until two o'clock. [181]

(Whereupon recess was taken until 2:00 o'clock p.m. of the same day.)

Afternoon Session

Tuesday, November 22, 1955

2:00 O'clock P.M.

JOE N. BAUM

resumed, previously sworn.

Direct Examination

Mr. C. Huntington Jacobs: Q. Mr. Baum, subsequent to this, the taking of this account with Mr. Ramsey in September of 1953, did you have any other interview with Mr. Ramsey?

Mr. Shapro: If your Honor please, I am going to object to the form of the question, to the use of the words "taking of account". It calls for the conclusion of the witness and assumes a fact not in evidence.

The Court: Well, it does.

Mr. Jacobs: I will withdraw it.

The Witness: I didn't mean it that way at all.

Mr. Jacobs: Q. Subsequent to the interview that you have referred to that you had with Mr. Ramsey during which the accounts of the business were examined, which I understand occurred in September of 1953, did you have have any interview with Mr. Ramsey?

A. Why, I saw Mr. Ramsey a few days later, yes.

Q. Where?

A. At Mr. Elliff's place of business.

Q. And who was there? A. Mr. Elliff.

Q. Besides Mr. Ramsey and yourself?

(Testimony of Joe N. Baum.)

A. Yes.

Q. Now was anything said at that time about a new arrangement between Twin City Company and Pine Supply Company or Mr. Elliff?

A. No. I think the occasion that I saw Mr. Ramsey next is when he came down and gave Mr. Elliff orders to close the warehouse up.

The Court: When was that?

The Witness: Oh, your Honor, I'd say within a very few days after the evening that we had spent going over the accounts receivable and accounts payable that I testified to before.

The Court: Well, that is the end of September, is it?

The Witness: Yes, sir, just around the end of September.

Mr. Jacobs: Q. And it was still in the month of September, was it?

A. I am pretty sure it was, Mr. Jacobs. It was right around the end of the month.

Q. And after that—well, withdraw that question.

Was any discussion had at that time about the financial condition of the business or the intentions of Twin City Company regarding it?

A. Well, if I remember correctly, Mr. Ramsey came down and said that he was—and gave Mr. Elliff instructions to release [183] the employees and to close the warehouse up, and that until something could be worked out, the warehouse was going to remain shut.

(Testimony of Joe N. Baum.)

Q. Now was anything said about what could be worked out at that interview?

A. I don't think at that particular time it was. There was nothing said about it.

Q. Was any subsequent discussion had about that?

A. Yes. I think that after Mr. Elliff notified the employees, we went over to the Hester Branch of the Bank of America.

Q. Now who is "we"?

A. Mr. Elliff, Mr. Ramsey, and myself. And I think our visit over there was to straighten out something about a check which had been given to the Twin City Lumber Company and upon which payment had been refused by the bank.

Q. I see. Well, what occurred on that occasion at the Hester branch?

A. The conversations that Mr. Elliff and Mr. Ramsey had with the manager of the bank, I was not a party to.

Q. You were there after that?

A. We all were sitting in an automobile outside in front of the bank.

Q. Now who is "We", then?

A. Mr. Ramsey, Mr. Elliff and myself. [184] While I didn't pay too much attention to some of the conversation, I started late to listen to it—it involved Mr. Ramsey asking Mr. Elliff or telling Mr. Elliff about Mr. Elliff's possible helping Twin City liquidate the inventory and some other things which I don't remember too well now. But the one

(Testimony of Joe N. Baum.)

thing I do remember is that Mr. Elliff finally said, "Well, whether you know it or not Twin City Lumber Company is now in the lumber business in San Jose and here are the keys."

Q. Then what transpired?

A. Well, Mr. Ramsey told Mr. Elliff words to the effect that Twin City Lumber Company was not interested in selling lumber through the means of or the type of distribution outlet that Mr. Elliff was engaged in.

Q. What further was said, if anything?

A. And I don't remember too much more about the conversation after that. But that one point I do remember rather distinctly about Mr. Elliff stating, "Well, here are the keys, you are now in the lumber business."

Q. Now was there any subsequent discussion in regard to the intentions of Twin City Company respecting the Pine Supply Company?

A. Well, the next discussion I remember very definitely was when we went up to Mr. O'Connor's office to talk to Mr. O'Connor about preparing a \$28,000.00 note.

Q. And before we get to that point may I [185] ask you this question? Did you ever have a conversation at which Mr. Ramsey was present regarding the length of time or regarding the intentions—withdraw length of time—regarding the intentions of Twin City Company and regarding the possibility of a new agreement?

A. I can't state definitely as to whether that the

(Testimony of Joe N. Baum.)

intentions—the conversation about the intentions of the Twin City Lumber Company were mentioned at the meeting that I spoke about that wound up in sitting in the automobile out in front of the bank, or whether it was after that.

But I do know that at one time Mr. Ramsey had made some statement about the possibility if the inventory had to be liquidated, that there might be a chance of using some of the molding patterns in some Eastern shipment that Twin City Lumber Company might have to make.

But I can't definitely state just when I remember hearing that.

Q. Do you remember any discussion regarding the length of time during which the inventory was to be tied up, the stock and trade?

A. Well, the only thing I can say about that, Mr. Jacobs, is when Mr. Ramsey came down—I am pretty sure it was on a Friday afternoon—and informed Mr. Elliff that the warehouse was being closed and that Mr. Elliff should release his employees. [186]

Some remark was made to the effect that it was going to be—stay closed until either some working arrangement, some definite working arrangement could be worked out, or else that the inventory itself was to be liquidated to satisfy the debts of Mr. Elliff to the Twin City Lumber Company.

Q. Now who made that remark?

A. Mr. Ramsey.

Q. And is it your recollection that that was

(Testimony of Joe N. Baum.)

made at the time when Mr. Ramsey did come in and directed that the warehouse be closed?

A. Well, it was either made, as I say, then or very probably during this conversation that took place while we were waiting in the automobile outside of the Bank of America.

Q. I see. The same parties, I think you said, were present on both occasions? A. Yes, sir.

Q. Now all of these conversations that you have talked about were prior to the 6th of October, were they not? A. That is correct.

Q. That is, of 1953. Now on the 6th of October, 1953, did you have a conference with Mr. Elliff, Mr. Ramsey, and Mr. O'Connor?

A. Well, I know that I had—I was present at a meeting in Mr. O'Connor's office. Now as to whether it was on the 6th of October or not, I am not sure. [187]

The Court: Who was there?

The Witness: Mr. O'Connor, Mr. Ramsey, Mr. Elliff and myself.

The Court: And what was discussed at that conference?

The Witness: The first matter that was discussed was the preparation of a note in the sum of \$28,000.00, which Mr. Elliff and his wife were to sign in favor of the Twin City Lumber Company.

The Court: And was another subject discussed at that conference?

The Witness: Well, besides the amount of the note, I remember there was some discussion about

(Testimony of Joe N. Baum.)

the length of time that Mr. Elliff would be allowed to make payment on the note.

Mr. Jacobs: Q. Was there any discussion regarding a trust agreement?

A. I think that the subject of the trust agreement was brought up, but after a few minutes of discussion about it, Mr. O'Connor said that he was not conversant with the chain of events that led up to it and that he suggested that we wait and speak to Mr. Pasquinelli personally.

Q. Now in this discussion regarding the trust, did Mr. Ramsey take part?

A. I would say that he did, Mr. Jacobs, but the discussion was very brief.

Q. Were any of the terms of the trust [188] agreement that was suggested, were they discussed during this brief——

A. I don't think so. I think that the conversation regarding the trust agreement was very general about preparing a trust agreement to secure Mrs. Lannin's guarantee on the note, which Mr. and Mrs. Elliff were going to sign in favor of the Twin City Lumber Company.

Q. Well then, was any subsequent discussion of that subject had in your presence?

A. There was. Either the following day or the day after that, as I say again my memory isn't quite exact, we did have a meeting in Mr. Pasquinelli's office. When I say "we" there was Mr. Elliff, myself, Mr. Ramsey, and Mr. Pasquinelli.

Q. And what was discussed at that meeting?

(Testimony of Joe N. Baum.)

A. The item of discussion was the trust agreement that was to be written up.

Q. And did Mr. Ramsey take part in that discussion? A. He most certainly did.

Q. Now what part did he take in it?

A. Well, one part I remember specifically was that he stated that the Twin City Lumber Company insisted upon some trustee handling the funds of the business as that they were not very much interested in getting into any kind of arrangement where Mr. Elliff would be able to sign the checks.

Q. Did he say anything else in regard to the trust agreement that you recall? [189]

A. Yes. There was a general discussion as to how much or what percentage of the gross receipts of the business. In other words, the proceeds from the sales of the stock in trade was to be withheld by the trustee in order to make the payments as they became due under the terms of the note that I have just spoken about.

Q. Did Mr. Ramsey make any suggestion or make any statement in that regard as to what he wanted?

A. I think at the time that Mr. Ramsey had mentioned a figure of somewhere in the neighborhood of twenty-five per cent or better as the amount that should be withheld from the gross receipts of the business.

But after a general discussion up there the amount that was settled on was twenty per cent because everybody came to the conclusion that the

(Testimony of Joe N. Baum.)

twenty five percent withheld would be too much to expect to take out of the general funds of the business and still allow it to operate.

Q. Now you have read the trust agreement, have you not? A. Not recently, Mr. Jacobs.

Q. We have it in evidence here.

The Court: Here it is.

Mr. Jacobs: Q. Thank you, sir. I am showing you Exhibit 7 and ask you to look at that briefly and tell me whether that is the document that was under discussion at that Pasquinelli meeting. [190]

The Court: Counsel, how could he say whether it was or not, the document wasn't in existence at that time.

Mr. Jacobs: Q. Of course, you are right, your Honor, an oversight on my part.

Have you looked at that document briefly?

A. I just started to look at it, Mr. Jacobs.

Q. Will you please examine it first and I will ask my next question.

Do you see any provision in that document, the subject matter of which was not discussed at that meeting? A. Not offhand, Mr. Jacobs.

Q. What? A. No.

Q. Are we to understand then that all of the terms that you find in that document were discussed at that meeting?

Mr. Shapro: I object to that question, if your Honor please, upon the ground it is leading and suggestive and also it calls for the opinion and con-

(Testimony of Joe N. Baum.)

clusion of the witness, all the terms of the agreement.

The Court: Sustained.

Mr. Jacobs: Q. Let me ask you specifically, Mr. Baum, regarding this provision in the agreement for the payment of obligations of the business, it appears on page 4 and reads,

“That in order to alleviate as much as possible the manual work involved in the administration [191] of this trust, it is agreed that the trustor and/or his accountant shall submit to the trustee the proper invoices and vouchers along with checks drawn by the trustor in payment thereof—the said checks to be drawn upon the trustor’s personal account—and in order to forestall the possibility of attachment or other levy upon the said account, the said checks to be certified—and in turn, the said trustee shall deposit from the trust account into the account of the trustor sufficient monies to honor the said checks, and the trustee shall thereupon mail the checks to the person entitled thereto.”

Was there a discussion at that meeting about the inclusion of such a clause in the trust agreement?

A. There was, Mr. Jacobs, because it was my suggestion that such be done.

Q. And was there any discussion of the occasion for including such a clause in the agreement?

A. There was because at that time there were several creditors of Mr. Elliff’s who were rather

(Testimony of Joe N. Baum.)

insistent in their demands for payment. Particularly there was one, a lumber company up North, and that obligation was one that had been incurred by the partnership and as yet had not been paid.

Q. You mean the Abbott Lane partnership, do you? A. That is correct.

Q. And was there discussion at that meeting regarding the giving of notice to creditors?

A. There was.

Q. And what was said and by whom at that meeting in that regard?

A. Well, I remember Mr. Pasquinelli stating that in order to fully comply with the California law that a notice should be given to creditors regarding the assignment of interest in the inventory and also the receivables. And after that there was a general discussion—I do not remember which party said what—but it was generally agreed before the meeting came to an end that there would be no such notice given to creditors.

Q. Well, did Mr. Ramsey take part in that discussion? A. I believe Mr. Ramsey did.

Q. Did he express any dissent to that conclusion that you have mentioned?

A. Well, I can state, Mr. Jacobs, is that at the end of the discussion that everybody was in agreement that no notice would be given to creditors.

Q. You continued to be the auditor of that business until the end of the year, you have said?

A. That is correct. [193]

Q. Was any notice, to your knowledge, ever

(Testimony of Joe N. Baum.)

given to creditors of the discussion of the execution of a note or of the execution of the trust agreement? A. Not to my knowledge.

Q. I mean notice in any way, manner or form, by letter or by recording or any other manner?

A. Not to my knowledge.

Mr. Jacobs: May I have just a moment to consult this rather voluminous file? It won't take me more than a minute.

The Court: We have been going steadily since 1:30. We will take a recess.

(Recess.)

Mr. Jacobs: I believe I can say, your Honor, that it is stipulated that this group of documents, which includes Plaintiff's 4 for Identification, your Honor, the open account of Twin City Company.

Mr. Shapro: Mr. Jacobs, if there is going to be a stipulation, let's not use the word "open" because I am not going to stipulate to the use of the word "open."

Mr. Jacobs: Let's say it's a page of the accounts receivable ledger, pages A and B of the accounts receivable ledger.

Mr. Shapro: Of what?

Mr. Jacobs: Of an account between Pine Supply Company and Twin City Company. [194]

Mr. Shapro: Of an account, not the account.

Mr. Jacobs: Of an account.

Mr. Shapro: Then I will accept the amendment.

The Court: Gentlemen, don't you think we could move along a little faster? If you are going to put

(Testimony of Joe N. Baum.)

something in by stipulation, let's not be so slow.

Mr. Jacobs: I beg your Honor's pardon. Commencing with the date May 7th, 1953, and ending the final date of April 26th, 1954, that is offered in evidence as the Trustee's Exhibit next in order, that is, the ledger sheet and all of the accompanying vouchers.

The Court: I suggest that as it is presently marked Plaintiff's Exhibit 4 for Identification that we admit it in evidence because the invoice is on the top, the first sheet of that. All right, it may be admitted in evidence.

(Thereupon the foregoing ledger sheet was admitted and marked as Plaintiff's Exhibit No. 4 in Evidence.)

Mr. Jacobs: And it is also stipulated, your Honor, I take it, that this document that I now hold there is a photostatic copy of the account kept by Twin City Company of the deals between itself and Abbott Lane Company and we offer that as Trustee's next in order.

The Court: Exhibit 12 admitted.

(Thereupon the foregoing document was admitted and marked as Plaintiff's Exhibit No. 12.) [195]

Mr. Jacobs: We obtained a transcript from the records of Twin City Company regarding a warehouse account.

Mr. Shapro: Do you have it?

Mr. Jacobs: And Mr. Baum has the sheet.

(Testimony of Joe N. Baum.)

Mr. Shapro: Let me see it. All I have to do is look at it.

Mr. Jacobs: I think he has the original.

Mr. Shapro: He probably has.

The Court: This is a case gentlemen that illustrates the possible advantages of pretrial. Rather than to go into Court, it could have been determined by pretrial or by deposition, as we would save a lot of time.

Mr. Jacobs: That is appreciated, your Honor. I ought to say in behalf of all the counsel here, your Honor, that my own notice of this thing was received upon my return of trying another matter in Fresno. I got notice of it—not through any fault of opposing counsel or the Court or anybody else, but by force of circumstances—I got my first notice of it approximately three days before the date of trial.

So that the time for preparation on the part of the trustee was correspondingly restricted.

I now hold what is stipulated to be an accurate transcript of the account left by Twin City Company which demonstrates its warehouse account, is that correct?

Mr. Shapro: That is correct. [196]

Mr. Jacobs: Covering its dealings with Pine Supply Company. I offer this as the Trustee's Exhibit next in order.

The Court: Exhibit 13 in Evidence.

(Thereupon the foregoing ledger page was

(Testimony of Joe N. Baum.)

introduced and marked as Plaintiff's Exhibit No. 13 in Evidence.)

Q. (By Mr. Jacobs): Mr. Baum, at the time of the October transaction, that is to say, on October 6th, that was at the beginning of it, 1953, do you know what specifically what checks had been issued by Pine Supply Company or by Mr. Elleff to the order of Twin City Company which have not been paid and were still held by that company?

A. My—to the best of my knowledge there were three checks.

Q. And what were they?

A. There was one for \$741.26; one for \$7,310.98; and one for \$2,500.00.

Q. Has any of those checks ever been paid?

A. No.

The Court: I don't understand what you are talking about, counsel. Are you going back to the meeting at the bank?

Mr. Jacobs: No, sir. We are referring now to the time when this transaction, this note and deed of trust transaction occurred.

The Court: It involved \$10,000.00 worth of bad checks? [197]

Mr. Shapro: The witness will identify them, your Honor.

The Court: And it involved this note of \$28,000.00?

Mr. Shapro: Correct.

Q. (By Mr. Jacobs): Now during the time that you served as an auditor for the firm, was any of

(Testimony of Joe N. Baum.)

these checks ever returned to Mr. Elliff?

A. Not to my knowledge.

Q. Now subsequent to the October transaction—withdraw that.

First I want to ask you this question. Did you have any correspondence subsequent to the October 8th conference in Mr. Pasquinelli's office at which Mr. Elliff and Mr. Ramsey were present?

A. I did.

Q. Where did that take place?

A. It took place in a restaurant over near San Rafael, either the Venetia Palms or Richfield Arms. It's a restaurant—hotel—motel and swimming pool a little ways past the Golden Gate bridge.

Q. (By Mr. Shapro): Bermuda Palms?

The Witness: Bermuda Palms.

Q. (By Mr. Jacobs): And who was present?

A. Mr. Ramsey, Mr. Elliff, and myself.

Q. Did you go over to that conference with Mr. Elliff? A. I did. [198]

Q. Now were any documents taken by yourself and Mr. Elliff to Mr. Ramsey on that occasion?

A. There were.

Q. What were they?

A. If I remember correctly, the trust agreement and the promissory note, and the letter of transmittal.

The Court: A letter of what?

The Witness: Transmittal.

Q. (By Mr. Jacobs): And what was done with those documents?

(Testimony of Joe N. Baum.)

A. They were given to Mr. Ramsey for his examination.

Q. Did he examine them on that occasion?

A. He did.

Q. And does that include the trust agreement?

A. Yes.

Q. Did you see him read it? A. I did.

Q. And then what happened to those documents?

A. Those documents were to be forwarded to Mr. Hunter down in Los Angeles along with one other document, which Mr. Elliff had not brought over because he did not have it, namely, a financial statement of Mrs. Pearl K. Lannin. The conversation resolved itself into the fact that since Mr. Elliff still had to attain the financial statement from Mrs. Lannin and since I had to go down to Los Angeles on some personal business, that both of us was to take all the documents down [199] there and deliver them to Mr. Hunter since we would get down there and be able to deliver them at least as fast, or possibly faster than the mail would reach him.

Q. Was there any discussion about any communication between Mr. Ramsey and Mr. Hunter in the meantime?

A. The only thing that I remember is that Mr. Ramsey looked over the documents and said they were in order and he would forward them down by mail to Mr. Hunter.

Q. But then it was subsequently decided——

A. It was decided that Mr. Elliff should take

(Testimony of Joe N. Baum.)

them down there and deliver them personally.

Q. Did the two of you do that? A. We did.

Q. When did you do it?

A. We delivered those documents on the following Sunday, if I remember correctly. We went down to Los Angeles and relatively early on a Sunday morning we drove out to Mr. Hunter's house in Beverly Hills. I sat in the car, Mr. Elliff went to the door of the house. The maid answered the door and Mr. Elliff handed an envelope to the maid containing the documents.

Q. Do you know the documents that were in the envelope? A. Yes, I do.

Q. And specifically what were the documents that were delivered to Mr. Hunter? [200]

A. There was at least one copy of the trust agreement, a signed promissory note, and a financial statement of Mrs. Lannin, and some letters of transmittal, which I had not read.

Q. Now, subsequent to that, did you have anything to do with the warehouse receipts that have been mentioned here? A. No.

Q. You had nothing to do with it. And were any purchases made after October of 1953 by Pine Supply Company from Twin City Company?

A. There were.

Q. And when were they made?

A. There was one purchase made on November 20th, 1953, and one purchase made on November 25th, of 1953.

Q. Was anything subsequently bought?

(Testimony of Joe N. Baum.)

A. No. Those were the only two that——

Q. You mean from Twin City?

A. Those were the only two that I have a record of that were purchased from Twin City Lumber Company.

Q. I see. Do you have a record of payments made for these purchases? A. Yes, I do.

Q. I will ask you to examine before I consult your own records, the records of the Twin City Company. I am referring to Exhibit 4. Do you find a record of payments for those purchases on Exhibit 4? [201]

A. Yes. There are a record of four payments on the Twin City records.

Q. And on what days, according to those records?

A. February 3rd, 1954, \$726.83; March 29th, 1954, \$3,170.37; March 29th, 1954——

The Court: That is the same day?

The Witness: \$446.25; and April 26th, 1954, \$1,200.00.

Q. (By Mr. Jacobs): Do the records of Pine Supply Company show the dates of payments made by Mr. Elliff, if any, on the \$28,000.00 note?

A. Yes, they do.

Mr. Shapro: I don't know that it is necessary to go into that. It can be stipulated that this is the document which you gave me.

Mr. Jacobs: It is stipulated, if your Honor please, the document I am now offering, which is dated October 6, 1953, is Twin City Lumber Com-

(Testimony of Joe N. Baum.)

pany's records of the payments received on the \$28,000.00 promissory note, including the dates and amounts of those payments.

The Court: Are you offering this?

Mr. Jacobs: Yes, sir.

The Court: Exhibit 14 in evidence.

((Thereupon the foregoing Twin City Lumber Company's records of payments received on the \$28,000.00 promissory note was marked Plaintiff's Exhibit No. 14 and received in evidence.) [202]

Mr. Jacobs: I think that is all.

Cross Examination

Q. (By Mr. Shapro): Mr. Baum, as I recall your testimony, you participated with Mr. Ramsey in three conferences prior to the execution of the promissory note, the deed of trust—correct me if I am wrong—namely, a meeting at the office of Twin City Lumber Company, San Francisco, in the latter part of August, 1953. A. That's right.

Q. You said that he was in and out, Mr. Ramsey was not in during the entire conference, as I recall your testimony. A. That is correct.

Q. Secondly, next in order of time, chronologically, a meeting about two or three days later in San Jose.

A. No, I didn't say two or three days later, Mr. Shapro. I said that we had a meeting in—I met with Mr. Ramsey in San Jose.

Q. When was it with respect to the San Fran-

(Testimony of Joe N. Baum.)

cisco meeting of the latter part of August?

A. Well, I would say it was some time after that because I remembered distinctly that the meeting that I think you are talking about, the one that we went over—are you talking about the accounts receivable?

Q. No. In between the very brief meeting, the very brief meeting at which the question of the payment of the bill or [203] something else being done was discussed. Perhaps I am confused as to the time. Did that follow the meeting at which the books were opened up? A. I'd—

Q. It is not my purpose to confuse you nor certainly not the Court. What I am trying to ascertain is: Before you met with Mr. Ramsey and Mr. Elliff in the Pine Supply office in San Jose in the latter part of September when the books were, as you testified, examined or reviewed by Mr. Ramsey, you had how many previous discussions with Mr. Ramsey at which, to use Mr. Jacobs' words, the financial condition of Mr. Elliff was discussed?

A. I think that I testified that the one—at least the one meeting that I was, as I said, I imagine it was in the latter part of August. That was the one up in the Twin City Lumber Company's office in San Francisco.

The other meeting I think I testified to, where we were sitting out in front of the bank, occurred after the time that we sat down and reviewed the books.

Q. I realize that, sir. But wasn't there another

(Testimony of Joe N. Baum.)

short meeting in the office of Twin City Lumber Company; it was just the three of you, you, Elliff and Ramsey were together?

A. I don't remember stating that, Mr. Shapro.

Q. Regardless of whether you said it or not, was there such a meeting? [204]

A. It might possibly have been that I saw Mr. Ramsey at times other than the three times that I stated. But the only times that I remember any definite items of conversation were the ones that I testified to.

Q. Now, tell me, sir, at the meeting at the latter part of September, the only persons present were you, Mr. Elliff, and Mr. Ramsey, at Mr. Elliff's office? A. That is correct.

Q. Now, you testified that you made available to Mr. Ramsey the books and records of Pine Supply Company? A. That we did.

Q. Now, were the accounts receivable displayed to him? A. They most certainly were.

Q. Were the accounts payable displayed to him?

A. I remember that we took out the unpaid bills and made them available for Mr. Ramsey.

Q. Was the total of those bills given to him?

A. As far as I remember, Mr. Shapro, a tape was made, an adding machine tape was made of the unpaid items.

Q. Do you have any record of those?

A. No, because all those records were taken by Mr. Ramsey.

Q. Did you ever give Mr. Ramsey or show Mr.

(Testimony of Joe N. Baum.)

Ramsey at any time a balance sheet of the affairs of Pine Supply Company?

A. No, I do not think I did, Mr. Shapro.

Q. Now, referring your attention to the meeting in the [205] Twin City office in San Francisco in the latter part of August of 1953, were any figures as to assets or liabilities presented?

A. No, there were not.

The Court: What are you looking for?

Mr. Shapro: I am looking for the balance sheet, December 31st, 1953, balance sheet. Here it is. It is Exhibit No. 11.

Q. To your knowledge, Mr. Baum, was a copy of what is now denominated as Plaintiff's Exhibit No. 11 ever given to any representative of Twin City Lumber Company?

A. Not to my knowledge, sir.

The Court: That balance sheet is December 31st, 1953, isn't it?

Mr. Jacobs: That is after the October transaction.

Q. (By Mr. Shapro): After the October transaction. And your testimony is, as far as you can recall, to your knowledge no balance sheet as of any time was ever given to any representative of Twin City Lumber Company?

A. Not to my knowledge.

Q. Now, you mentioned the assets and liabilities of the Abbott-Lane business as of the time of its liquidation, and we have as an exhibit a copy of the partnership return here, do we not?

(Testimony of Joe N. Baum.)

A. Yes, sir. That was the Federal partnership.
The Court: I don't think I have it.

Mr. Shapro: I am sorry, your Honor.

The Court: Oh, here it is.

Mr. Shapro: It is an income tax return.

Q. Now, Mr. Baum, as you testified and as appears on Exhibit 9, as of the time of dissolution which you state on this return was May 20th, 1953, the partnership of Hodes and Elliff previously called Abbott-Lane, but as of the time of dissolution called Pine Supply Company, had a capital deficit of \$2,208.18.

Now, as I understood your testimony, Mr. Elliff paid to Mr. Hodes something in excess of \$5,000.00 for Hodes' interest in the partnership, isn't that correct?

A. That is correct.

Q. Now, just how much did Mr. Elliff pay Mr. Hodes and when?

A. Upon the dissolution of the partnership a note, or a note on which a balance was still due to Mr. Elliff in the amount of \$1,500.00 was cancelled. That was part of the consideration.

And then Mr. Elliff signed a note in favor of Mr. Hodes calling for regular monthly payments. I can give you the amount of the note if you want.

Q. Would you please? A. Yes. [207]

Q. And you mentioned this morning while you are at it, the terms—or referred to the terms of the dissolution agreement and the amount to be paid. Do you have a copy of that dissolution agreement?

(Testimony of Joe N. Baum.)

A. No, I do not.

Mr. Jacobs: I can give you that, Mr. Shapro.

Mr. Shapro: All right.

The Witness: The note was in the amount of 33—the balance on May 20th was \$3,385.00.

Q. (By Mr. Shapro): \$3,385.00, plus the \$1,500 note that was cancelled, represented thirty-three fifteen, namely, the note which Mr. Elliff paid to Mr. Hodes for Mr. Hodes' interest in the Abbott-Lane partnership? A. It's \$4,800.00.

Q. Oh, I beg your pardon.

A. And then was some additional consideration in that the partnership was set up on such a basis that the partnership of Hodes and Elliff was selling on open account to a business solely owned by Mr. Hodes, and at the same time purchasing items also on open account, and the balance due by Hodes, as an individual, to the partnership, was considerably more than the balance of the partnership owing to Mr. Hodes as an individual.

Q. Was that cancelled?

A. Yes, and that was also cancelled at the time.

Q. How much was that?

A. To the best of my knowledge, it was several hundred dollars.

Q. In other words, in addition to the \$4,600.00, there was an additional consideration of several hundred?

A. Additional consideration, yes, sir.

Q. And that makes the total of something in excess of \$5,000.00 that you mentioned before?

(Testimony of Joe N. Baum.)

A. That is correct.

Mr. Shapro: Did you find that agreement, Mr. Jacobs?

Mr. Jacobs: Not yet.

Q. (By Mr. Shapro): In order to expedite it, do you recall the provisions of the agreement with respect to the measure of this purchase price?

A. I do. The measure of the purchase price called for the—you know, the wiping out of the current account or transfer accounts back and forth; the cancellation of the \$1,500.00 due by Mr. Hodes to Mr. Elliff; and the execution of this thirty-three hundred eighty-five dollar note.

Q. I understood from your testimony this morning that the amount, the exact amount that would ultimately be paid to Mr. Elliff by Mr. Hodes as a result of this dissolution was dependent upon a view of those offers.

A. It was in the partnership dissolution agreement.

Q. Oh, by an act—— [209]

A. There was a stipulation in there that the final amount was to be determined and any adjustment made when an audit was made.

Q. Then I still want to know, if you recall it, in the absence of having the agreement, I want to know if you can tell me the basis upon which the purchase price was to be affected by the adjustments, disclosed by an audit?

A. Well, the dissolution agreement was—and the figures contained therein were stated from the facts

(Testimony of Joe N. Baum.)

that I have given you on the mutual agreement that both parties believed that this was the correct price; but if an audit revealed at a later time to the parties that the figures they stated were incorrect, then an adjustment was to be made.

Q. Either up or down?

A. Up or down, yes, sir.

Q. And as I understood your testimony this morning, the difference was finally adjusted with a matter of a few hundred dollars?

A. This was not because of adhering strictly to the terms of the agreement. What had happened was, a few days later, Mr. Elliff—

Q. Later than what, sir?

A. Later than the execution of the original dissolution agreement. Mr. Elliff had, without counsel, gone up to the office of the attorney for Mr. Hodes and signed some agreement [210] stating in effect that an audit had been made and the figures as stated in the partnership dissolution agreement were correct. Mr. Elliff had forgotten about it by the time that I started to audit the affairs of the partnership. It was upon my advice, stating that he had overpaid Mr. Hodes considerably for the theoretical equity that he had purchased from Mr. Hodes, that payments were—he had then gone to Mr. Pasquinelli and Mr. Pasquinelli wrote a letter. I don't remember either Mr. Hodes or his attorney stating that no further payments would be made until an audit was completed.

We had one conference up in Mr. Pasquinelli's

(Testimony of Joe N. Baum.)

office that was fruitless. And then upon a second conference, Mr. Hodes' attorney flashed this document with Mr. Elliff's signature on it. There wasn't much more one could do about it, except, as I say, settle up.

I think the final consideration amount to some \$300.00 less than called for in the partnership dissolution agreement.

Q. In other words, to sum it up, from what you have testified to this morning and this afternoon on this particular subject, Mr. Baum, for a deficit capital account of \$2,208.00 Mr. Elliff actually paid over \$5,000.00 to Mr. Hodes?

A. That is correct.

Q. Now, Mr. Baum, you testified this morning that as of the meeting the latter part of September in the office of the Pine Supply Company at which the books were looked into by [211] Mr. Ramsey, there was approximately \$25,000.00 in inventory, approximately \$25,000.00 in accounts receivable, and there was about \$2,000.00 in equities in the equipment—or you gave the Court the exact figures—and there was about \$50,000.00 indebtedness, is that right?

A. That is substantially right, sir.

Q. Now, I show you, Mr. Baum, Plaintiff's Exhibit No. 11, which represents a period three months later, right?

A. That's right.

Q. And it shows total assets of \$43,907.00, that is inclusive of accounts receivable, which before reserve for bad debts was \$12,000.00. In other words,

(Testimony of Joe N. Baum.)

the accounts receivable had apparently halved in that period, is that right? A. Yes.

Q. And the inventories were about the same on your estimate of \$25,000.00, and the fixed assets figure, the gross asset figure is \$6,700.00 minus contracts, finally leaving an equity of about \$2,200.00.

So they were about the same, I mean, as we testified this morning. Now at that time, that is, of December 31st, according to Exhibit 11, the total liabilities of Elliff, dba Pine Supply Company, were \$61,000.00.

In other words, the assets had reduced by approximately \$9,000.00 and the liabilities had increased approximately \$11,000.00, is that right? [212]

A. That is correct.

Q. And yet referring your attention to Plaintiff's Exhibit No. 10, for the whole year, that is, from the beginning of the Pine Supply business, the operation of Mr. Elliff showed an operating loss as per Exhibit No. 10 of only \$7,603.00. Could you explain that?

A. Part of it can be explained, Mr. Shapro, to the effect that any drawings that Mr. Elliff made personally from the business were not coming out against the profits.

Q. Tell me, Mr. Baum, how much Mr. Elliff withdrew after September 30th from this business and before December 31st?

A. It probably, since——

Q. After the latter part of September when you had this meeting, down to the end of the year,

(Testimony of Joe N. Baum.)

within the last three months, we'll say.

A. Oh, he might have withdrawn twelve or thirteen hundred dollars, something like that. Here, you can add this. There is \$4,900.00 here plus 80—well, that is roughly \$810.00, so it's \$4,000.00 — \$1,900.00 to the end of the year. In other words, take the \$4,900.00, subtract from it roughly \$810.00. He drew out to that total.

Q. Do you shown an increase—are you able to tell from the books how much his indebtedness increased from the end of September to the end of December of '53?

A. Well, the only thing I can say right off bat, [213] Mr. Shapro, is that the accounts payable increased where some of the notes and fixed obligations decreased.

Q. In other words, the obligation to Twin City Lumber Company, which, as of October 1st, let's say, was \$28,000.00, approximately had been reduced by December 31st to \$25,500.00?

A. That is correct.

Q. And the obligation of Mrs. Lannin about which you testified, \$7,000.00, was still owing?

A. That's right.

Q. But there is still a drop of approximately \$9,000.00 in assets and an increase of liabilities of approximately \$11,000.00.

A. Wait a minute, wait a minute. Another point that might be, Mr. Shapro, is on this inventory valuation, and if I remember correctly, instructions were given to Mr. Elliff at the time the inventory

(Testimony of Joe N. Baum.)

was to be taken, to take the inventory, physical inventory, on the basis of cost or market, whichever was lower. Now, it is very possible there that the inventory figure might, on a book value basis, be higher.

But as far as for tax purposes, the inventory, because of items that didn't move or might have been damaged or spoiled or something like that, were written down to a more realizable value.

Q. The inventory figures on Exhibit 11, the December 31st balance sheet, had still taken the book value at cost? [214]

A. I said cost or market.

Q. Which way; you tell me which it was then.

A. I didn't take the inventory, Mr. Shapro.

Q. Show me from the books whether it was taken at inventory or cost.

A. The inventory, you couldn't ask me that, because I was not present at that time. All I was given was an inventory figure.

Q. Was there a continuing inventory in the general ledger?

A. No. There was not a perpetual inventory kept in the general ledger. Those records were kept by the manager of the field warehouse.

Q. Now, tell me, Mr. Baum, when this inventory was taken in the form that you have described by reviewing the warehouse records between you and Mr. Ramsay and Mr. Elliff, which again was in this meeting at the latter part of September of 1953—do you recall that?

(Testimony of Joe N. Baum.)

A. I recall going over.

Q. You testified this morning that the inventory figures were based upon the warehouse receipt data which the warehouse man gave you and which you did not have, were not able to retain, right?

A. I had no control over it at all.

Q. Isn't it a fact, Mr. Baum, that at that time—and I [215] am referring now to the end of September, 1953—there was considerable inventory not in the field warehouse?

A. As far as I remember, Mr. Shapro, that is not the case.

Q. Well, now, you testified, Mr. Baum, this morning, that as of that time, part of the stock in trade which you described was plywood, do you recall that? A. That's right.

Q. Was there any plywood in the field warehouse at the time of this meeting, at the time this inventory was taken?

A. I am pretty sure there was some plywood on the floor of the warehouse building.

Q. Now, in the field warehouse—you know what I mean?

A. That's right. Anything in the field warehouse was supposed to be subject to the terms of this warehouse agreement.

Q. Mr. Baum, will you try to answer my question. My question was: To your knowledge, was there any plywood in the field warehouse at the time this inventory was taken at the end of September?

(Testimony of Joe N. Baum.)

A. I said to my knowledge, Mr. Shapro, there was.

The Court: What do you mean: to your knowledge?

Q. (By Mr. Shapro): Did you see warehouse receipts, sir, covering any plywood at that time?

A. I think I did.

Q. That is your best recollection? [216]

A. That is my best recollection.

Mr. Shapro: In due course, the warehouse receipts will be produced, your Honor.

Q. Mr. Baum, will you tell us what books Mr. Ramsay examined at this meeting in the Pine Supply office at the end of September?

A. The only books of account that were kept, Mr. Shapro, was——

Q. I didn't ask you what was kept. Please just tell me what you examined.

A. There was this book and there was a book like this keeping accounts receivable, and a file of accounts payable, which were listed on sheets like this here (indicating).

Q. This book that you referred to is a green canvas covered book?

A. That is right. At the time, though, it was in this binder.

Q. But the sheets that are now contained in the green canvas were in another binder at the time?

A. That's right.

Q. Will you show me, please, in this book the one you have identified, namely, the green canvas

(Testimony of Joe N. Baum.)

covered, the sheet which indicates the indebtedness to Mrs. Lannin of \$7,000.00?

Mr. Jacobs: That is assuming a fact not in evidence, your Honor. It hasn't appeared so far that the \$7,000.00 was shown by that book. [217]

The Court: He has asked him to show it to him.

Mr. Shapro: The witness shows me a ledger sheet headed "Pearl K. Lannin," with a date, December 31st, 1953, a journal entry 15, of \$7,000.00.

Q. Now, Mr. Baum, are you going to tell me, please—will you tell the Court that that sheet was in that book in October of '53?

A. No, Mr. Shapro, I never said that that sheet was in the book. This sheet was in the book, the entries on the back side of the sheet weren't.

Q. Then I asked you, sir, just a moment ago, to show me where in the book that was shown to Mr. Ramsay that I had identified as this green sheet was shown the indebtedness to Mrs. Lannin of \$7,000.00.

Mr. Jacobs: To which I objected at the time that it had not so far appeared in evidence that the \$7,000.00 was shown by that book.

Q. (By Mr. Shapro): I will ask another question if I may, your Honor.

Mr. Baum, did the book which is now bound in green canvas and which was shown to Mr. Ramsay in the meeting of September, 1953, contain a ledger sheet or an entry indicating an indebtedness to Mrs. Lannin of \$7,000.00 at that time?

A. No, it did not.

(Testimony of Joe N. Baum.)

Mr. Shapro: I would like to have this book marked [218] for identification, your Honor, because we have referred to it.

The Court: All right. It may be marked Defendants' Exhibit C for identification.

(Whereupon the book described was marked Defendants' Exhibit C for identification.)

The Court: What do you call it, a ledger sheet?

The Witness: This is a combined ledger and journal, sir.

Mr. Shapro, I think you should make some arrangements with Mr. Jacobs, because I took these books of account from the trustee when I came up here.

Mr. Shapro: I am satisfied that whatever arrangements are necessary will be made between Mr. Jacobs and myself and with the Court's approval.

I don't think there will be any difficulty in view of the fact, your Honor, that these books are in frequent use because there are a large number of actions pending or in preparation on behalf of the trustee against various debtors, namely, we do need the books of the bankrupt, the records as compiled by this accountant.

Q. Now, Mr. Baum, will you show me what records of any sort were shown to and inspected by Mr. Ramsay in this meeting in September, 1953, indicating the indebtedness of Mr. Elliff dba Pine Supply?

(Witness hands a group of ledger sheets to Mr. Shapro.) [219]

(Testimony of Joe N. Baum.)

Q. (By Mr. Shapro): You have handed me a group of ledger sheets, accounts payable ledger sheets, ledger sheets which have on the cover page the words: "Accounts Payable 1953."

Incidentally, in whose handwriting do those words appear?

A. Mrs. Barnhart. The other records that were given to Mr. Ramsay as far as I——

Q. Wait a minute. Please, let's stick to the question I asked you. This is what was shown?

A. As far as I remember, it was.

Q. Now, Mr. Baum, I just at random picked up one item, one of the ledger sheets which runs in favor of Durable Plywood Sales. I find entries on that sheet commencing with October 31st, 1953.

A. That is very possible, Mr. Shapro. This is the accounts payable ledger for 1953. Now, when I say that is what he examined, he could only examine the sheets of the record of the transactions up to the time he looked at them.

Q. I asked you, and I repeat now, sir, I want you to show me the records of Mr. Elliff that were shown to Mr. Ramsay that he examined at the meeting in September of 1953.

A. Very well, Mr. Shapro. Some of those records I cannot produce to the court because they are in either my office or the trustee's office in files. There are several batches of invoices, both billing to Mr. Elliff's customers; there are [220] several folders of invoices where people have billed Mr. Elliff. When I offered this, it was the accounts payable ledger and in there there were sheets that

(Testimony of Joe N. Baum.)

he could have looked at, had he wanted to, because they were entries prior to the time that he came down.

Mr. Shapro: Your Honor, in view of what I know to be a sharp conflict in evidence, that will have to be resolved in connection with this meeting of September of 1953, I feel that we are entitled to have this witness, and also Mr. Elliff, on cross examination, identify and pinpoint the particular records which they say were examined by Mr. Ramsay. And if necessary, your Honor, and it is, in my humble judgment, so important to the case of the defendants whom we represent, that the records, if they are not here and they are in the trustee's possession, should be brought here, because I am quite serious in undertaking to cross-examine both this witness and Mr. Elliff in connection with that subject before, of course, your Honor hears the defendants' case. I think it is a reasonable request, and I am perfectly willing to proceed with cross-examination on other lines. But I do want to reserve the right and ask your Honor to instruct the trustee, the plaintiff, and the accountant, to produce tomorrow all of the records which either the trustee or the witness has in their possession, or under their control, which the witness will identify as having been shown to Mr. Ramsay in 1953 at [221] the September meeting.

Mr. Jacobs: Well, he is asking for a great volume of records. What is the bulk of them, Mr. Baum?

The Witness: Well, Mr. Jacobs, I cannot go

(Testimony of Joe N. Baum.)

through every piece of paper there and state whether Mr. Ramsay examined it or not because no identifying——

The Court: That isn't what you are asked to do, Mr. Baum. That isn't the question. The question is to give us the ones that were shown to Mr. Ramsay; whether he examined them or not is another matter.

Mr. Jacobs: The ones that were presented to him, counsel, I think counsel must mean the ones that were presented—that were made available to Mr. Ramsay for his examination. Am I not stating it correctly?

Mr. Shapro: That is correct.

The Witness: Well, then, every scrap of paper that was in the office at the time that Mr. Ramsay walked into the office was made available to him for his examination.

Mr. Shapro: Your Honor, let's be reasonable about this. My question only refers to the documents and the records that were shown to him in connection with liabilities, not every scrap of paper.

Mr. Jacobs: Well, when could you do it, within what period of time could you get them together?

The Witness: Well, most of them, I think, are in that [222] filing cabinet that was moved over to my office from the trustee's office. Now, I would have to sit down, Mr. Jacobs, and actually pull out, first separate all those invoices, etcetera, and find out which ones were dated, so they probably would have been received prior to September 30th

(Testimony of Joe N. Baum.)

or thereabouts, before I even attempted to bring it into court.

Otherwise, there is probably a couple of drawer-fulls of records there.

Mr. Jacobs: Your Honor can see what we are confronted with by counsel's demand. I sympathize with it and wish that some way could be found to satisfy his requirements without the delay that it is going to entail. It is perfectly clear the witness can't do this in a moment.

How long will it take, can you estimate?

The Witness: It will take at least the better part of a day or more.

Mr. Shapro: Your Honor, I am sincere in urging it. It is not an ideal request, neither do I want to put the Court or the witness to any undue inconvenience. It is in my humble judgement a very serious point in this case. I want to explore it in the interests of our clients to the fullest extent.

I think in view of the testimony we have already had, I am certain I am entitled to it.

Mr. Jacobs: Well, it's beyond my humble wisdom, your [223] Honor, what ought to be done in a situation like that.

The Court: Counsel, on direct examination this witness has said, "We gave to Mr. Ramsay all the records." Then on cross examination they say, "What records?" It is just as simple as that. They are entitled to them under that basis.

Mr. Jacobs: But must we segregate records

(Testimony of Joe N. Baum.)

relating to liabilities and records relating to assets on the basis of that direct examination?

Mr. Shapro: Not if you want to—I will withdraw my offer. I thought it would simplify matters, to liabilities. To the liabilities; if you want to produce them all on both sides——

Mr. Jacobs: I have no objection. That would be far simpler. It would diminish the bulk. But it is still tremendous.

Mr. Shapro: If I may say, your Honor, those records have been gone over both by the trustee, Mr. Jacobs and by myself. There is a great mass of those records and there is no context or order or anything else. I will produce all the records that I have in my possession that belong to Pine Supply Company.

Mr. Jacobs: And that you had at that time?

Mr. Shapro: No, no.

The Witness: The only thing I can produce, Mr. Jacobs, [224] is what I have in my possession right now. I can put that whole filing cabinet on a truck and send it up here.

Mr. Shapro: Again may I suggest that we are trying to be reasonable. If you were at this meeting, Mr. Baum——

The Witness: That is correct.

Q. (By Mr. Shapro): You were the accountant for Mr. Elliff? A. I was.

Q. You have testified and so has Mr. Elliff that certain records were displayed to Mr. Ramsay at that time? A. They were.

(Testimony of Joe N. Baum.)

Mr. Shapro: I know of nobody better than the witness and his client to pick up the records that they say—I am entitled to have them and that is exactly what I want.

Mr. Jacobs: I beg your pardon?

The Court: I understand the testimony of both the witnesses referred to and was to the effect that all of the records that they had were made available to Mr. Ramsay. That was my understanding of the testimony, and I think the record will bear me out. They can produce all the records that this witness can now get a hold of and the trustee can get a hold of——

Mr. Shapro: Your Honor, may I interrupt a minute?

I am only asking—I have only asked for those records concerning liabilities which this witness said was made available in that meeting to Mr. Ramsay. That is all I ask for. [225]

Now, if he wants to bring them all, I have no objection, but my request is limited to the question of liabilities.

The Witness: Your Honor, if I can state something, when Mr. Ramsay came down here, we told him, both Mr. Elliff and I did, that all the records were available for his inspection. We mentioned—I remember stating that in the filing cabinet was the accounts payable and the unpaid bills. Now, I do not remember specifically which of the bills Mr. Ramsay examined and which——

Mr. Shapro: That isn't the question. His Honor

(Testimony of Joe N. Baum.)

cautioned you on that before, that nobody asked you to identify the items which Mr. Ramsay examined, because that would involve a conclusion by you, namely, as to whether he examined them or not.

The point is: What records of liabilities were there?

Now, you testified a few moments ago that a pile of invoices were shown to him and that there was an adding machine tape, but you didn't have the adding machine tape. I want to see the invoices, and if the adding machine tape is available, then I want to see that. If it is not, then of course I can't have it.

The Witness: Well, Mr. Shapro, the reason that I cannot—I cannot give you the adding machine tape is, I said I do not have it. Now, which invoices at the time were included in that stack of unpaid bills that were taped, I [226] would have to go back—to the best of my knowledge try to pick out which ones indicated “not to be paid.”

Now, it is very possible that I might not include some that possibly were included in the tape. On the same hand, I might very definitely include some that weren't included on the tape.

Q. (By Mr. Shapro): Mr. Baum, nobody imputes infallibility to you or anybody else. All I am asking you is that you do that to the best of your ability.

Mr. Jacobs: How many boxes are filled with the records?

(Testimony of Joe N. Baum.)

The Witness: I have one or two cardboard boxes and two or three file drawers full of all this miscellaneous data of Pine Supply Company.

Your Honor, I would have to go through there and try to find just those invoices that were dated prior to September 30th or thereabouts of 1953. They are not in alphabetical order or date order.

The Court: Gentlemen, I can end this very quickly. I think counsel has made a reasonable request. Now, if it is going to take time to get it, I can continue this matter for one week, two weeks, three weeks, and you can dig them up in the meantime. I don't want any more discussion about it.

Mr. Jacobs: We will cooperate to the very utmost of our ability, I promise that, in all sincerity. How long it will take us to get this material, frankly I wouldn't estimate [227] anything less than a full day and it might take two. I would suggest this: It could be done over the weekend.

Mr. Shapro: It's all right with me. We could proceed then if the Court could find us the time.

The Court: Then the direction is that the accounts payable that were made available for examination by Mr. Ramsay in the September meeting will be produced by the plaintiff, is that right, and the time of that, which we will——

Mr. Shapro: We will leave open, at least until we get through.

The Court: Until we get to the adjournment time, we will leave it open.

Mr. Jacobs: I hope your Honor will indulge us

(Testimony of Joe N. Baum.)

to this extent. Of course, the trustee and myself have no personal knowledge whatever about this. We will get together all of the records in our possession that appear to meet the specifications of counsel.

The Court: All right. Let's go ahead.

Mr. Shapro: May we have marked for identification, your Honor, the group of ledger sheets that have the heading or title, "Accounts Payable in '53."

The Court: It may be marked Exhibit D for identification.

(Whereupon the group of ledger sheets entitled "Accounts Payable in '53" was marked for identification as Defendants' Exhibit D.)

Q. (By Mr. Shapro): On that subject, Mr. Baum, Exhibit D, which [228] the clerk is now marking, were those ledger sheets or any of them available and shown to Mr. Ramsay at the December meeting?

A. I know they were available, Mr. Shapro, and I know that Mr. Ramsay was informed that he could look at any records in the office. Now, as to whether he examined all of the sheets that were in the accounts payable ledger at that time, whether he examined some of them or not, I could not state.

Mr. Shapro: Your Honor, may I have the question read? I don't think——

The Court: Read the question.

(Question read.)

Q. (By Mr. Shapro): Available and shown.

(Testimony of Joe N. Baum.)

A. If I remember correctly, Mr. Shapro, they were available. And I think the accounts, if I remember correctly, the accounts payable ledger was shown to Mr. Ramsay as such.

Q. And you call that group of documents marked Defendants' Exhibit D for identification the accounts payable ledger?

A. Yes, because they were in an individual binder at the time.

Q. I merely am asking you to identify them.

A. Yes, sir.

Q. If, as you say, the Exhibit D was not only available but given to Mr. Ramsay for his inspection, the accounts payable ledger, what was the occasion for this voluminous list and group of invoices?

A. It might very well be, Mr. Shapro—

Q. Please, I don't want any "it might very well be." Will you answer the question? If you know, say so; if you don't, say so.

A. Yes. At the end of September, the books of account had not been closed for September and the purchases entered in the accounts payable ledger and the payments made during the month of September entered against the various accounts.

Q. And would you say that with the exception of the debt and credit entries in the accounts payable entries for the month of September up to the date that you mentioned—we don't know what that date was—but towards the latter part of September—with the exception of the September entries,

(Testimony of Joe N. Baum.)

debts and credits, that the accounts payable ledger was correct at that time?

A. I would say so, Mr. Shapro.

Q. Then why was it necessary to show more than the September invoices to Mr. Ramsay as payables?

A. So that Mr. Ramsay could verify himself as to the extent of some of these accounts that he wanted to.

Q. Let me get that straight; maybe I misunderstand you.

The accounts payable ledger, which is now marked Defendants' Exhibit D was available and shown to Mr. Ramsay at that meeting and with the exception of the purchases and payments, the debts and credits in the accounts payable ledger [230] for the month of September up to the date of the meeting, they were correct. But in addition to this, you showed him drawers full of invoices, as I understood you?

A. Now, Mr. Shapro, I didn't say that there were drawers full. Mr. Ramsay was shown the unpaid bills.

Q. Was he shown unpaid bills which had already been entered into the accounts payable ledger? A. Yes, he had.

Q. He was shown all that? A. Yes.

Q. I see. Now, from your recollection, did he examine, and by examine, I mean actually read any invoices other than for the month of September?

(Testimony of Joe N. Baum.)

A. I think to my best recollection he did, Mr. Shapro.

Q. Now, what did this adding machine tape cover that you have testified to?

A. I think a tape was made of all the unpaid bills on hand, as of the date of this meeting.

Q. Whether or not they were entered into the accounts payable ledger? A. That's correct.

Q. And who made up this adding machine tape, who ran it off on the machine?

A. Frankly, I don't remember whether it was Mr. Ramsay or myself. [231]

Q. Now, you say you didn't take it away with you. Do you know what happened to this adding machine tape? A. No, sir, I do not.

Q. Did anybody request you to make available to Mr. Ramsay the invoices of payables which had already been entered in Defendants' Exhibit D?

A. No.

Q. Are you familiar with Mr. Hodes' signature? You called it Hodes and somebody else calls——

A. I think it is Hodes.

Q. Are you familiar with his signature?

A. No, I am not, Mr. Shapro.

Mr. Jacobs: I have seen his signature repeatedly; if I can assist you, I will. I think I have some of the documents if you can give me time to——

Mr. Shapro: There is no hurry about it, there is no hurry.

Q. Getting back again, Mr. Baum, to this meeting at the end of September of 1953, what, if any,

(Testimony of Joe N. Baum.)

information did you give to Mr. Ramsay concerning liabilities of Mr. Elliff, other than those involving Pine Supply? A. None.

Q. What, if any, information did you give at that meeting to Mr. Ramsay concerning assets of Mr. Elliff other than those of Pine Supply? [232]

A. None.

Q. Now, as I remember your testimony of this morning, Mr. Baum, the July, August and September sales were each in excess of \$13,000.00, right?

A. If I could have that book, Mr. Shapro, to refresh my memory?

Q. You are asking for Defendants' C for identification? A. July, August and September?

Q. Yes, sir; that is, of '53.

A. Well, July's were just around \$13,000.00; August's were roughly \$17,500.00.

Q. September, about?

A. And September roughly around \$13,200.00.

Q. Now, during those three months or during each of those three months, did Mr. Elliff make a profit?

A. As I testified before, Mr. Shapro, I think I stated that he made some profit in July, a little bit better than \$1,000.00 in August. And as I say now, we never took an actual profit statement. As I have said before, what we did was take the sales and apply the expenses as they were incurred or paid.

Q. Isn't it a fact, Mr. Baum, from your experience with Mr. Elliff's business as his accountant that

(Testimony of Joe N. Baum.)

if sales would average \$13,000.00 a month or better throughout the year, that he could have made a profit?

A. I would have to qualify my answer, Mr. Shapro. [233]

Q. You are at liberty to do it, sir.

A. I would have to qualify it. It would depend to a large extent on how much of the work Mr. Elliff did himself and how much he had other people do for him.

Q. Let's in fairness to both sides just answer the question if you will. Having in mind the way he was operating in July, August and September of 1953.

A. Well, I think that if his sales were consistently better than \$16,000.00 or better, with a fair markup, he could probably have made a small profit during the year.

Q. Now, you testified that to the best of your ability that his markup, his average markup, was 20 to 25 per cent? A. About that.

Q. Isn't it a fact, Mr. Baum, that the 20 per cent that was put in the trust agreement was predicated upon average sales of \$10,000.00 a month and that \$2,000.00, therefore, would meet the first payment, which was due February 1st, 1954?

Mr. Jacobs: Just a moment. Your Honor, he is asking for his opinion and conclusion as to what the provisions are predicated upon. No proper foundation has been laid for it.

The Court: This is cross examination. If the

(Testimony of Joe N. Baum.)

witness said he was present at the conference and all the terms of this agreement were discussed—this is cross examination—I think he is entitled to ask it. If it isn't true, he can say no. Will you read the question? [234]

(Question read.)

A. Well, I knew there was a payment due in the beginning of February.

Q. (By Mr. Shapro): If it will help you to answer the question, take a look at Defendants' Exhibit B, which is the note in question. Would you like to look at the trust agreement?

A. I remember the 20 per cent on the trust agreement. Well, quite to the contrary, Mr. Shapro, I am not exactly sure as to what the monthly sales were estimated, or we presumed they were going to be. But part of the monies on this 20 per cent that was coming out, we estimated would come out of the collections on the accounts receivable. That is how we got up to a figure of \$10,000.00, based on—for the first payment.

Q. Well, your sales record, that is included in your profit and loss statement for the period of the operation in 1953, shows gross sales for a period of six months of about \$73,000.00, right?

A. It's about, close to seven and a half months, Mr. Shapro.

Q. I am looking now at Exhibit 10.

A. It's around May 20th, at the end of the year that June——

Q. Six months, plus ten days, seven months.

(Testimony of Joe N. Baum.)

A. Seven months, it's——

Q. It's about \$73,000.00? A. That is correct.

Q. So there was an average of about \$10,000.00 a month? A. That's right.

Q. Can you tell the Court, Mr. Baum, as long as you have testified that Mr. Ramsay suggested first something higher than 20 per cent and it was finally agreed 20 per cent, on what basis the 20 per cent figure was arrived at by the parties to this conference?

A. Well, one of the reasons was, Mr. Shapro, that that was the lowest figure that we could get Mr. Ramsay to agree on and go along with the other arrangements that ultimately allowed the inventory to be released, and Mr. Elliff continue in business.

Q. That was one reason. Any others?

A. Yes, there were. The only reason that this business could finally, if it ever had a chance to work——

Q. This is a discussion that we are talking about?

A. That is right, Mr. Shapro. The only way that the business could bail itself out of the situation that it was in, which was that it was shut up, was to re-open. And if those were the best terms that could be gotten under the arrangements, those were the ones that would have to go on.

Q. Mr. Baum, is it your testimony that the question of how much in sales Mr. Elliff would expect to do during the period that this note was to

(Testimony of Joe N. Baum.)

be paid was not discussed between the three of you?

A. It was discussed, Mr. Shapro.

Q. Then what were the figures that were discussed?

A. Well, frankly I don't remember specifically. But I am pretty sure that they were in excess of \$10,000.00 a month.

Q. In excess of \$10,000.00? A. Yes, sir.

Q. Now, Mr. Baum, you are familiar—you were familiar at the time and I assume still are familiar, with the method of the Twin City Lumber Company crediting 70 per cent of the invoice price of lumber that went into the warehouse after the May warehouse agreement? By being familiar with it, I mean you know that only 70 per cent was carried in the warehouse account?

A. I know now, yes, Mr. Shapro.

Q. When you took the inventory from the warehouse receipts in this meeting of September of 1953, on what basis, dollars and cents wise, was it taken?

A. I think—as I say, I am trading on memory now, Mr. Shapro, because this happened two years ago. But if I remember the records that the warehousemen kept were stated in the terms of physical count. In other words, so many pieces of this costing X amount of dollars and the perpetual inventory was carried in total of pieces and dollars, not at a 70 per cent basis. The warehouseman's records had nothing to do with the accounting for

(Testimony of Joe N. Baum.)

the way Twin City carried their accounts on [237] their books.

Q. That is exactly what I wanted to know. Now, showing you Plaintiff's Exhibit No. 13, which I understand you prepared from the ledger record of the Twin City Lumber Company—

A. That is correct.

Q. —you will notice that as of the end of September, there was owed, according to this ledger sheet, owed to Twin City Lumber Company on its warehouse account by Pine Supply \$17,416.05, right? A. That's right.

Q. And that was part of the figure that made up the \$28,000.00 on the note, is that right?

A. That is right.

Q. Now, according to your knowledge, did that figure of \$17,416.05 represent 70 per cent of the invoice price of the lumber then in the warehouse or 100 per cent?

A. Mr. Shapro, that figure—the only definite answer I can give you is that that figure did not represent the cost basis, 100 per cent cost basis, of the inventory in the warehouse.

Q. Then if the cost price was in excess, as you have just testified—

A. I didn't say was in excess, Mr. Shapro. I said that this figure did not represent 100 per cent of the cost price of the inventory in the warehouse at the time. [238]

The Court: Will you explain that answer?

The Witness: Yes, I will, your Honor.

(Testimony of Joe N. Baum.)

One of the troubles—or one of the reasons that the warehouse was closed up, was the fact that the Pine Supply operation was not operating [239] with the terms of the original warehousing agreement whereby only, I think it was \$2,000.00 worth of inventory was to be withdrawn at, I think, during a weekly period, and anything over then that had to be paid for.

As a matter of fact, there were, I would hazard a guess——

Q. Don't guess, please; based upon your information——

A. There was at least \$7,000.00 worth of inventory withdrawn from the warehouse.

Q. By Mr. Elliff?

A. That is right, and invoiced to his customers and not paid for by Mr. Elliff at the time.

Q. Then again, Mr. Baum, your estimate of this morning of the value at cost of the inventory of lumber on hand at the time you and Mr. Ramsey and Mr. Elliff made this, I will call it an inventory for lack of a better term, of \$25,000.00 was based upon one hundred per cent of cost of the merchandise in the warehouse at the time?

A. I am pretty sure that was correct, Mr. Shapro.

Mr. Jacobs: Just a moment. Will you identify the particular item that you are referring to that you and the witness pointed to something?

Mr. Shapro: I am sure I said September 24th and the amount \$17,416.05.

(Testimony of Joe N. Baum.)

What is an aging, do you know what I mean by an aging of the accounts receivable of Pine Supply shown to Mr. Ramsey on this meeting in the latter part of September? [240]

A. I think Mr. Ramsay and Mr. Elliff and I sat down and we aged the receivables right there.

Q. As you went through? A. Yes, sir.

Q. In other words, you went through the receiveable items by item with reference to date?

A. That's right, invoice by invoice.

Q. Now Mr. Baum at any meeting that you had with Mr. Ramsay other than the meeting of September, 1953, did you show him or was there shown to him in your presence any other records or any financial figures referring to the Pine Supply business? A. Not to my knowledge, Mr. Shapro.

The Court: Just a moment. Read that.

(Record read.)

Mr. Shapro: Q. Now Mr. Baum did you at the meeting that you participated in with Mr. Hunter at the Twin City office in San Francisco in August of 1953 show Mr. Hunter any figures, figures of course referring to Twin City financial—

A. As far as I remember, Mr. Shapro, I did not.

Q. Were any figures given to Mr. Ramsey by you or in your presence at the meeting referring to personal indebtedness of Mr. Elliff other than Twin City—other than Pine Supply—I am sorry. [241]

A. Not—I don't think there were.

Q. Were any figures given to Mr. Hunter by you or in your presence at that meeting with ref-

(Testimony of Joe N. Baum.)

erence to assets that Mr. Elliff—other than Pine Supply? A. I don't think there were.

Q. Did you examine the contents of the envelope that Mr. Elliff left with Mr. Hunter's maid on that Sunday in Beverly Hills immediately before he took it up to the house? A. No, I did not.

Q. When previously to the time it was delivered to the maid did you last see the contents of that envelope?

A. Well, if I remember, Mr. Shapro, after Mr. Ramsey got finished reading that trust agreement and examining some of the other papers that were in the envelope, I saw Mr. Elliff put the things back in an envelope. The next thing I remember was that Mr.—as far as these papers go: of Mr. Elliff delivering something to the maid down in Beverly Hills.

Q. And that was a difference of between Friday and Sunday? A. That is right.

Q. Friday night in San Rafael and Sunday morning in Beverly Hills? A. That is right.

Q. You didn't see it in the interim?

A. I did not.

Q. Would you recognize the letter of [242] transmittal that you have referred to as being taken over to San Rafael? A. No, I would not.

Q. Who prepared that letter, if you know?

A. I think that letter was prepared by Mr. Pasquinelli.

Q. You are sure you wouldn't recognize it if I showed it to you?

(Testimony of Joe N. Baum.)

A. No, I wouldn't, Mr. Shapro.

Q. When you told the Court this morning then that you were sure—that is the word you used—that in the envelope at the time of its delivery to Mr. Hunter's home there was the financial statement of Mrs. Lannin, the original promissory note, and at least one copy, to paraphrase your words, at least one copy of the trust agreement. You based that entirely upon what you saw in the envelope the Friday preceding the Sunday at which this delivery was made, right?

A. No. Plus the fact that when I went down to Los Angeles with Mr. Elliff he said, "I have these documents and on our way home I want to stop off at Mr. Hunter's home and deliver them."

Q. In other words, your testimony of the certainty of the contents is based upon what Mr. Elliff told you plus what you saw on the preceding Friday?

A. That is right.

Q. Would you recognize the financial statement of Mrs. Lannin if I showed it to you? [243]

A. I never saw the financial statement of Mrs. Lannin.

Q. How do you know it was in the envelope when it was delivered?

A. Because Mr. Elliff told me one of the reasons he had to go down there was to deliver the financial statement to Mr. Hunter.

Q. Mr. Baum, how much more of the testimony you have given today have you given as information of your own knowledge as opposed to that

(Testimony of Joe N. Baum.)

which is based entirely upon what Mr. Elliff told you?

A. The only thing that what might be a question about is what I have just told you now, Mr. Shapro.

Q. You are sure? A. Yes.

Q. Mr. Baum, you mentioned this morning that there were some checks issued by Mr. Elliff to Twin City Lumber Company which had bounced, to use the colloquialism—other than the three checks that were outstanding and which had bounced and which were included in the \$28,000.00 note, is that right?

A. No—will you repeat that question again, please?

The Court: Were there other checks than the three checks?

The Witness: Yes.

Mr. Shapro: Q. You testified that there were?

A. That is right. [244]

Q. Do you remember when those checks were issued and bounced? I don't mean exactly the dates, approximately.

A. It would be sometime, oh, say, between the middle of August and the beginning of May. That is as close as I can come.

Q. In other words, the beginning of May was the four—

A. No. What I meant was the beginning of the business in May and sometime between then and August.

(Testimony of Joe N. Baum.)

Q. Well, did you have any personal knowledge of that other than after July of 1953?

A. Why, yes. I could go back and examine the checks vouchers that finally cleared through on the financial statement.

Q. You say you could. My question is you did?

A. I did, yes.

Q. Is it your testimony that there were checks issued by Elliff to Twin City Lumber Company prior to July 10th, 1953, which had bounced and ultimately cleared?

A. To the best of my recollection there were, Mr. Shapro.

Q. You don't have any record of those, do you?

A. Well, there was a file on protest notice, in the files that were brought over to my office, and I looked for—I mean in the files that were brought over to my office I looked for a special envelope that I had set up when I was doing Mr. Elliff's work that we used to keep the protest notices in. [245] But I couldn't find it.

Now I could probably go back and go through Mr. Elliff's records and find at least one or two of those checks which I am quite certain were dishonored during that period of time and not the three checks in question.

Q. The only ones I am talking about are checks at the beginning of his business which would be May 20th and about July 10th. Do you recall any between those two dates?

A. Well, all I do know is I recall checks that

(Testimony of Joe N. Baum.)

were dishonored at the bank, Mr. Shapro.

Q. Those checks were all paid ultimately through the bank? A. Yes, I am positive they were.

Q. Now these three checks that bounced toward the end, and the amount of which was included in the \$28,000.00 note, were never paid by the bank?

A. That is right.

Q. As far as you know, was any demand made upon Mr. Elliff for payment of those checks by anybody?

A. Well, I know that there was some discussion. Now I am trying to remember who Mr. Elliff spoke to about the one check in particular, seven thousand two or three hundred dollar check not clearing the bank. Now I don't remember—there was quite a discussion about that one.

Q. Perhaps I didn't make my question clear. I am referring to the time after a period of time, after October 6th, after [246] the issuance of the \$28,000.00 note, to your knowledge was any effort made by anybody to—

A. After October?

Q. —by anybody to collect those checks?

A. Oh, in—not after October 6th.

Q. How long did this meeting at the Bermuda Palms in San Rafael take?

A. Oh, it might have taken an hour more or less, Mr. Shapro.

Q. *What* is your best estimate?

A. Best estimate.

Q. And it was just the three of you?

(Testimony of Joe N. Baum.)

A. Yes.

Q. You, Elliff and Mr. Ramsay. How long did the meeting with Mr. Hunter in August of 1953 in San Francisco take?

A. It might have been an hour, more or less.

Q. That is your best estimate? A. Yes.

Q. How long did the meeting of the end of September in Mr. Elliff's office take?

A. At the one in which he——

Q. In which Mr. Ramsay examined the books?

A. That took several hours, Mr. Shapro.

Q. Would you estimate it for me and also give me the hour of the day?

A. It was in the evening. I don't think we [247] got out of there until about nine or ten o'clock in the evening.

Q. About what time did you start?

A. I'd say we started somewhere around five thirty or six.

Q. It took you somewhere between two and three——

A. Three or four, something like that.

Q. Now getting back again to the meeting in Mr. Pasquinelli's office, which I think you said took place either a day or two after the meeting with Mr. O'Connor, right? A. That's right.

Q. Was the note that had been discussed with Mr. O'Connor discussed with Mr. Pasquinelli at the following meeting?

A. I think the only mention about the note was that we informed Mr. Pasquinelli that we had gone

(Testimony of Joe N. Baum.)

into Mr. O'Connor's office and he had referred—he was going to prepare the note in the amount of \$28,000.00.

Q. He was going to. In other words you told Pasquinelli, you or somebody at the meeting told Pasquinelli, that a day or two previously you had taken up with Mr. O'Connor in preparation of the \$28,000.00 note, is that right? A. That's right.

Q. All right. Now tell me, you testified a few moments ago on direct examination that the trust agreement was made for the protection of Mrs. Lannin, is that right?

A. Well, that was the purpose of it, yes, sir.

Q. To your knowledge at the meeting with Mr. Pasquinelli, [248] was anything said by anyone that the promissory note for \$28,000.00 would not be delivered until the trust agreement was signed?

A. The only thing that I remember about it, as far as that transaction goes, Mr. Shapro, it was my impression that this was all——

Mr. Shapro: Please, if your Honor please, I think I am entitled to an answer to the question as I asked it. If the witness doesn't know he can say so. I don't want his impression.

The Court: The answer so far may go out. Read the question and then answer it, please.

The Witness: May I ask you——

The Court: You just answer it yes or no. Mr. Baum, there are three ways you can answer it, yes, no, or I don't know.

The Witness: I don't know.

Mr. Shapro: Q. Mr. Baum, did Mr. Ramsey at

(Testimony of Joe N. Baum.)

that meeting in Pasquinelli's office say in your presence or hearing that he was there in order to get the note as soon as he could?

A. I don't remember that either, Mr. Shapro.

Q. You wouldn't say he didn't say it, though?

A. I don't remember it.

Q. Did Mr. Pasquinelli make notes at this meeting with you [249] and Mr. Elliff and Mr. Ramsay?

A. Yes, he did.

Q. I mean handwritten notes?

A. That's right.

Q. When did you for the first time see a type-written draft or the agreement itself, the trust agreement?

A. I think it was shown to me a few days after the meeting, Mr. Shapro.

Q. Was that before or after you went to San Rafael?

A. I am not positive, but I think it was before we went to San Rafael.

Q. Was the copy of the trust agreement that you saw the first time signed?

A. No, it was not.

Q. Was it signed in your presence?

A. No, it was not.

Q. By any of the parties to it?

A. No, it was not.

Q. Was the promissory note signed by any of the parties to it in your presence? A. No, sir.

Q. Did you see the original promissory note and read it before it was delivered or shown to Mr. Ramsay in San Rafael?

(Testimony of Joe N. Baum.)

A. No, sir, I don't think I did.

Q. Did you see the original trust agreement signed before [250] it was, as you have testified, shown to Mr. Ramsay in San Rafael?

A. No, I don't think I did.

Q. You spoke a few moments ago, Mr. Baum, of protests, protests of checks. Isn't it a fact that the protesting of checks to which you refer is an item of \$21.00 protest fees on the three checks that were included in the \$28,000.00 note?

A. No, Mr. Shapro. I am fairly certain that we had a separate file which we used to put all letters and communications from the Bank of America to, you know, to Pine Supply.

I am pretty sure there were protest notices other than that in there.

Q. Now you are sure, are you not, Mr. Baum, that included in the total that Mr. Elliff testified to of \$28,116.53, which was the amount of the indebtedness of Elliff to Twin City Lumber Company as of the time the note was given, included an item of \$21.00 for protest fees? A. That is correct.

Q. And those protest fees were incurred in connection with the three bad checks that you identified, namely, \$2,500.00, \$741.26, \$7,310.98?

A. That is right.

Q. Do you know how the \$116.53 was paid to Twin City?

A. I would have to look for the records [251] to refresh my memory, Mr. Shapro.

Q. Do you have the records there?

(Testimony of Joe N. Baum.)

A. Well, let's see. I have got one of them right here.

The Court: While the witness is looking through the records, have you any estimate as to how long your cross-examination will be?

Mr. Shapro: I think my cross-examination of this witness your Honor, without regard to the production of the additional records, would take possibly fifteen, twenty minutes more at the most. Then, of course, the next order of business I presume will be the cross-examination of Mr. Elliff. That, I am sure, your Honor, will take some time, considerable time.

The Court: I am trying to consult the convenience of this witness. He says he is in from San Jose. Should we try to finish it tonight or——

Mr. Shapro: I doubt that, your Honor. We have to go through the records item by item. If I get the answer to this one question, this happens to be a rather convenient point to drop off. But that of course is up to your Honor.

Mr. Jacobs: Your Honor, there will be, I presume, some cross-examination by Mr. Robert Jacobs and there will be a little redirect.

Mr. Shapro: In that case maybe this is a good time to adjourn.

The Court: If we could finish in fifteen or [252] or twenty minutes I would be perfectly willing to do that, but with the three of you, I doubt it.

Mr. Jacobs: It's very much appreciated, your Honor. I want the Court to know it, and I know I

(Testimony of Joe N. Baum.)

speak for all of us, including the witness, I am sure, but we couldn't possibly finish with him.

The Court: Well, if we can't finish let's discuss this. Do you want this witness to come back tomorrow or do you want to put him on at some future time when he has had an opportunity to look at his records?

Mr. Jacobs: Don't you think it would be best and most conserving of his time, Mr. Shapro, to let him come back after the weekend when he has had an opportunity to compile these records to satisfy your demand.

Mr. Shapro: Certainly.

The Court: What weekend? You mean we are not going to finish this week?

Mr. Shapro: We won't finish tomorrow, your Honor.

Mr. Jacobs: Do you think you could or have you got other plans?

Mr. Shapro: We have jumped the gun, may I say, your Honor. We have jumped the gun. I want to confess that we are trying to talk you into avoiding a Friday hearing, your Honor. In this case, your Honor, it was a left-hand curve.

The Court: I think you should come out in the open and ask for it. [253]

Mr. Shapro: An oblique approach sometimes accomplishes the purpose, your Honor.

The Court: I take it that none of you want to return Friday?

Mr. Shapro: I think we can stipulate to that in this case.

(Testimony of Joe N. Baum.)

Mr. Jacobs: I will say this in favor of the conspiracy and this is that I have been trying this case while I have been recovering from a very bad case of intestinal flu. I would welcome a recess but I wouldn't ask for it for the world because——

The Court: I guess the answer is we don't return Friday, then.

Mr. Shapro: Can we leave it this way, your Honor, with respect to Mr. Baum, that when the next date is set that that will be the time he comes back because we wish to accommodate him on the record.

The Court: Other than tomorrow.

Mr. Shapro: Other than tomorrow, yes.

The Court: Well now, you will ask Mr. Baum to come back at such time as we have agreed to come back after tomorrow?

Mr. Jacobs: Certainly. He will be back here and have the records with him, your Honor, as far [254] as we are able to satisfy that demand. [255]

(Thereupon an adjournment was taken until 10:00 o'clock a.m. of Wednesday, November 23, 1955.)

Wednesday, November 23, 1955

10:00 o'clock a.m.

Mr. C. H. Jacobs: There are four matters, very brief ones, I want to examine Mr. Elliff on. I see I didn't on direct when I closed the examination yesterday.

Mr. Elliff, will you resume the stand, please?

GEORGE F. ELLIFF

recalled, previously sworn, for

Further Redirect Examination

Q. (By Mr. C. H. Jacobs): Mr. Elliff, on the occasion when Mr. Ramsey examined the records of the business at San Jose, that was late in September, as I understand—— A. Yes, sir.

Q. Of 1953—did he also examine the merchandise in the warehouse? A. He did.

Q. How long a period of time was spent in his examination of the merchandise in the warehouse?

A. Over the week we were probably in the warehouse four or five times, discussing the inventory and dead items in the inventory at the time.

The Court: What was that last?

A. Dead items.

The Court: What do you mean by that?

A. Stock that hadn't moved in six or eight months. [257]

Q. (By Mr. C. H. Jacobs): Was there any discussion as to whether or not these items were covered by warehouse arrangement?

A. They were covered, yes.

Mr. Shapro: I move to strike the answer of the witness, if the Court please, on the ground it is not responsive to the question.

Mr. C. H. Jacobs: I agree. I don't think the witness understood the question.

The Court: It may go out.

Mr. C. H. Jacobs: I asked him:

Q. Was there any discussion between you and

(Testimony of George F. Elliff.)

Mr. Ramsey, or in your presence, and in Mr. Ramsey's, whether these items in the warehouse were covered by the warehouse arrangement?

A. I don't think there was any doubt in Mr. Ramsey's mind or my mind because there was a complete record of it.

Mr. Shapro: I move to strike the answer of the witness on the ground it is his conclusion.

The Court: It may go out.

The question was: Was there any discussion between you and Mr. Ramsey about it?

Mr. C. H. Jacobs: The witness said he doesn't think it was specifically mentioned.

A. I don't believe it was, no.

Mr. C. H. Jacobs: As I understand it—— [258]

The Court: Well, you spoke of some records.

A. Mr. Ramsey——

The Court: Did these records show on their face these items in the warehouse?

A. Yes, sir, they did.

Q. (By Mr. C. H. Jacobs): Were any of these items not covered by warehouse receipts that had already been issued at the time of Mr. Ramsey's examination? A. You say: Were they?

Q. Were any of them not covered?

A. Not to my recollection, no, sir.

The Court: That is, all items in the warehouse were covered by the warehouse receipts' arrangement?

A. Yes, they were.

Q. (By Mr. C. H. Jacobs): What was the

(Testimony of George F. Elliff.)

method by which the warehouse receipts were issued on the merchandise in the warehouse?

A. When the material was received in the warehouse from the shipper, it was inventoried and—in other words, counted—to see that the correct amount of pieces or footage, whichever the case may be, was correct according to the invoice. Once we had received the invoice, it was typewritten on a non-negotiable receipt and sent to San Francisco.

Q. I see. With what instructions——

The Court: By “San Francisco,” you meant sent to the [259] Douglass people?

A. Douglass Guardian people, yes, sir.

Q. (By Mr. C. H. Jacobs): With what instructions, what were they to do, what did you tell them?

A. I didn’t know the procedure after that, but I presumed it was forwarded then on to Mr. Hunter in Los Angeles.

The Court: Well, who sent the information to San Francisco?

A. The bonded representative.

The Court: Barnhardt?

A. It would be Mr. Barnhardt.

Q. (By Mr. C. H. Jacobs): You mentioned in your previous testimony a check for approximately \$7200.00, I believe that was issued by you, I think you said some time in August.

A. I believe that is correct, yes.

Q. And was not paid on presentation and was protested.

A. It was not paid but was protested.

(Testimony of George F. Elliff.)

Mr. C. H. Jacobs: (To Mr. Shapro) Do you have that check?

Mr. Shapro: Yes, we have the check.

Mr. C. H. Jacobs: There is a notice of protest?

Mr. Shapro: Yes, attached to it.

Mr. C. H. Jacobs: May I have that, also?

(Counsel producing.)

Q. (By Mr. C. H. Jacobs): I show you, Mr. Elliff, a check on [260] the form of Pine Supply Company, drawn on the Hester Branch of the Bank of America, dated September 18, 1953, and in the amount of \$7,310.98.

I show you also a notice of protest, describing this check and signed by B. M. Creighton, Notary Public, Santa Clara, addressed to the Canadian Bank of Commerce, and attached also a protest of Dishonored Instrument, signed by the same notary.

Mr. Shapro: That is addressed to the Bank of America.

Mr. C. H. Jacobs: Yes, addressed to the Bank of America. And attached also to it is another Notice of Protest dated September 27, 1953, signed by the same notary, addressed to the Twin City Lumber Company.

Q. Are those the documents that you just referred to when you said they issued a check which was protested? A. These are, yes.

Mr. C. H. Jacobs: We will offer these as the Trustee's next in order, if your Honor please, all as one exhibit.

The Court: Exhibit 15.

(Testimony of George F. Elliff.)

Mr. C. H. Jacobs: May the record show they were produced from the files of the counsel for Twin City Lumber Company.

(Check in the amount of \$7,310.98 and notice of protest received in evidence and marked Plaintiff's Exhibit 15.)

Mr. C. H. Jacobs: May I also remark, for the record, [261] that the check of course bears no stamp showing payment.

The Court: Showing what?

Mr. Jacobs: Showing payment.

Mr. Shapro: Naturally, it was protested for non-payment.

Mr. C. H. Jacobs: Never had been paid.

Mr. Shapro: That's right.

Q. (By Mr. C. H. Jacobs): Now, Mr. Elliff, after you had issued that check and it had been protested, did you receive any communication from Mr. Hunter? A. I did.

Q. How did that communication come in?

A. To the best of my recollection, it was by phone.

Q. Mr. Hunter called you?

A. He called me, yes, sir.

Q. What, if anything, did he say about this check?

A. Well, he was pretty irate about the fact that it had come back from the bank.

Q. What did he say?

A. Well, he stressed the seriousness of it and his displeasure, and, well, he was——

(Testimony of George F. Elliff.)

Q. Did he say anything about the practice of issuing checks when the funds were not available to pay them?

A. Yes, there was a lot of discussion about this particular check. I mean, it went on for probably a week and when it was going to be made good, if it was going to be made good, [262] what shape the company was in, as far as accounts receivable——

The Court: What's that?

A. What shape the company was in, meaning how we stood on accounts receivable. Why it had been written—I mean, went into a lot of detail on it. Of course, he was protesting all during this time——

Q. (By Mr. C. H. Jacobs): Now, can you approximate the date of that telephone conversation?

A. About the 1st of September, I believe.

Mr. Shapro: The check wasn't protested until September 27, your Honor.

The Court: The check is dated the 18th of September.

Q. (By Mr. C. H. Jacobs): In reference to the protest of the check, how long after that was this telephone conversation?

The Court: Will you look at the dates of it there? (Handing witness.)

(The witness examines.)

The Court: The check is dated the 18th of September. One part of the protest is dated the 27th of September.

(Witness examining.)

(Testimony of George F. Elliff.)

A. Then it must have been prior to Mr. Ramsey that this telephone conversation took place.

Q. (By Mr. C. H. Jacobs): I see. Now, you say there was more than one conversation on this subject?

A. I think there were three in one day, if I remember [263] correctly.

Q. All from Mr. Hunter? A. Yes.

Q. All by telephone? A. Yes.

Q. Passing to another matter, after the October transaction, did you buy any stock in trade from other than Twin City Lumber Company—Twin City Company, I mean?

A. After October 8th?

Q. Yes. A. Yes, I did.

Q. Following that transaction, what percentage of your stock in trade—withdraw that.

You did make a purchase from Twin City Company in November, you said?

A. Yes, I did.

The Court: There were two in November, weren't there?

Mr. Shapro: Three, your Honor. The witness testified to two, but the record shows there were three.

The Court: I only have a record of two.

Mr. Shapro: There were two on November 20th. That is, the exhibit shows it.

Mr. C. H. Jacobs: I think the exhibit indicates there were two in November.

The Court: That's right. I have just two dates.

(Testimony of George F. Elliff.)

Mr. Shapro: The amounts are correct. It's just the number of invoices.

Q. (By Mr. C. H. Jacobs): Well, was it all on one order in these—in November payments, or do you remember?

Mr. Shapro: You mean invoices?

Mr. C. H. Jacobs: Invoices, yes, these November invoices.

A. I would have to refresh my memory on that.

Mr. Shapro: Just to answer your Honor's question, there were two invoices on November 20th, 1953, one for \$3,170.37, one for \$726.83. There was on November 25 an invoice of \$1,646.25.

I think your Honor has two of those, probably. I am reading from Exhibit 4.

The Court: They were paid at different times?

Mr. Shapro: Yes, they were paid at different times. Yes, they were paid in four payments.

The Court: I have it.

Q. (By Mr. C. H. Jacobs): Counsel has just been referring to, Mr. Elliff, these three exhibits in November—I mean these three items in November——

The Court: What is the point of it, counsel? We know what the fact is. Why do we want to labor that? Is there anything you want to show further?

Mr. C. H. Jacobs: I want to show what his percentage of the stock in trade consisted of, purchases from Twin City, [265] and what part consisted of purchases from others subsequent to the October transaction, your Honor.

(Testimony of George F. Elliff.)

The Court: Ask what he bought from other people.

Q. (By Mr. C. H. Jacobs): On the average, Mr. Elliff, following the October transaction, what percentage of your stock in trade consisted of purchases from others than Twin City Company, dollarwise?

A. Two-thirds, I would say, percentage wise.

Q. Percentage wise.

A. Percentage wise, two thirds.

Q. You mean two-thirds in value, in dollar value? A. In dollar value, yes, sir.

Q. Passing to a fourth matter, regarding this \$1200.00 payment that is shown by that exhibit No. 4, as having been made in April, how was that payment made?

A. That was a final payment in closing out the account, which was the last business you are speaking of?

Q. Yes. How was that made: by check?

A. It was made by check, yes.

Q. By check. And was that check cleared on presentation?

A. I believe there was one protest notice on it, but it was the fault of the bank. It was cleared the second time.

Q. It was cleared the second time. And in what month did it clear?

A. It shows here April 22nd they cleared it on their books, [266] so it must have been the latter part of April.

(Testimony of George F. Elliff.)

Mr. Shapro: Do you know when it was cleared yourself?

A. No, I don't, because I never got the statements back from the bank.

Mr. C. H. Jacobs: Do you have that notice?

Mr. Shapro: No, we don't have that check.

Q. (By Mr. C. H. Jacobs): That has never been returned to you from the bank?

A. No, sir. They say it is in the Federal Reserve Bank in San Francisco?

Mr. Shapro: If your Honor please, I am going to object to that on the ground it calls for hearsay.

Mr. C. H. Jacobs: Oh, granted. Granted.

The Court: Why wouldn't the check get back to him if it was paid?

Mr. C. H. Jacobs: Beg pardon, sir?

The Court: Why wouldn't the check get back to him if it was paid?

Mr. Shapro: I don't know.

Mr. C. H. Jacobs: They sometimes retain it, your Honor, if it bears a notice of protest in the clearing house.

The Court: Doesn't it get back to the maker?

Mr. Shapro: Of course it does.

Mr. C. H. Jacobs: It ought to.

Mr. Shapro: May I make the observation, your Honor, [267] that no check that has ever been protested is ever paid on its face by any bank. A new one may be issued, but no check that has ever been protested—I make this statement unqualifiedly—no check that has ever been protested is ever paid on

(Testimony of George F. Elliff.)

its face in the same form. If counsel wants to undertake to prove that, I suggest that he do so, because I don't think that it can be done.

The Court: What happens to it?

Mr. Shapro: A new check has to be issued. The check that is protested is returned to the bank of original deposit and therefore — to the original payee—like we have these three checks have been involved. But where a check—if this check were ever protested, which, as far as I know, was not the fact, this \$1200.00 check, if it was ever protested, it was never paid (this check was paid), that check would, in the normal course, your Honor, go back to the maker in this statement. Now, it may be that the bankrupt never picked up the statements, I don't know.

Mr. C. H. Jacobs: Well, there isn't any——

The Court: Did you ever draw a second check for that?

A. No, sir, but I did receive a protest.

Mr. Shapro: Do you have a copy of the protest on it?

A. It should be in the files of Pine Supply Company.

The Court: The witness stated a moment ago—and that may be the reason for it—that the protest was in error by [268] reason of the bank's error.

A. It was.

The Court: That may be the reason——

Mr. Shapro: The only thing, your Honor, I want to make the observation only that there is no evi-

(Testimony of George F. Elliff.)

dence yet that this check was ever protested, the \$1200.00 check.

The Court: Except the witness' statement.

Mr. Shapro: That's right, the witness' statement only.

The Court: He got a notice of protest.

Mr. Shapro: That's right.

The Court: After all, what difference does it make?

Mr. C. H. Jacobs: It doesn't make very much.

Mr. Shapro: I don't know.

Mr. C. H. Jones: The only object in going into that really and spending the Court's time on it, is that in the amendment to the complaint we alleged that that payment was made on or about May 7th, I believe, and this credit is given in April, and I want to show the two are one and the same.

Now, you may have the witness.

Further Recross Examination

Q. (By Mr. Shapro): Mr. Elliff, showing you Plaintiff's Exhibit No. 15, which is the protested \$7300.00 check, will you tell the Court, please, how that check was delivered by you and to whom, when it was first issued?

A. It was delivered Uhrich of the Douglass-Guardian [269] Warehouse Corporation.

Q. This check was delivered, was it not, in payment for merchandise withdrawn from the field warehouse at that time by you?

A. Without a date on it, yes.

(Testimony of George F. Elliff.)

The Court: What's that?

A. Without a date.

Q. (By Mr. Shapro): Without a date on what?

A. On the check.

Q. In other words, it is your testimony that the check, which is now part of Exhibit 15, was issued by you, delivered by you, to Mr. Uhrich of the Douglass Warehouse Company undated?

A. That is correct.

Q. But it was delivered for merchandise?

A. It was delivered with the instructions to hold it until the date could be put on.

Q. Who gave the instructions for the date to be put on it? A. No one.

Q. Who was to give the instruction?

A. I was.

Q. When did you get the merchandise out of the warehouse that this check covered, with reference to the date of issue of the check as compared to the date that it bears?

A. It must have been the latter part of August or the first [270] part of September.

The Court: The check was delivered at that time?

A. The check was delivered on or about the 18th, if I remember correctly.

The Court: Of what? A. Of September.

The Court: Did you say you got the merchandise in August?

A. It was withdrawals from the warehouse that the check was written for.

(Testimony of George F. Elliff.)

The Court: Then you got the merchandise in August before you delivered the check?

A. That's correct, sir.

The Court: Well, was that in accordance with your arrangement with the warehouse?

Mr. Shapro: No, your Honor.

The Court: Mr. Elliff, was that in accordance with the arrangement with the warehouse?

A. We had a lapse of time, it had built up over the \$2,000.00, so it covered more than one week; it must have covered about three weeks.

Q. (By Mr. Shapro): Now, Mr. Elliff, at the time you bought Mr. Hodes out of the Abbott-Lane partnership, which was the latter part of May, as I understand it, 1953, what personal assets did you have? By personal assets I mean other than assets of Pine Supply Company. [271]

The Court: After he bought him out?

Mr. Shapro: At the time, sir.

A. I don't know as I had any.

Q. When did you start building your home?

A. The first house or the second house?

Q. The house that you were occupying in October, 1953.

A. I was in a rented house at that time.

Q. Were you building a house in October?

A. No, sir.

Q. Were you building a house in May?

A. What year?

Q. '53. A. No, sir.

Q. When did you first start to build a house?

(Testimony of George F. Elliff.)

A. February of '54.

Q. February of '54? A. Right, sir.

Q. That is the first time you built a house or undertook to build a house?

A. No, it's the second time.

Q. When was the first time?

A. In September, 1947.

Q. Oh, way back in '47? A. Yes.

Q. All right. Now, did you own in May of 1953 or have [272] any interest in a lot other than the lot you have testified to as being on Mount Hamilton, which you testified was worth approximately \$2500.00?

A. I didn't own it. Mrs. Lannin held the mortgage on it.

Q. Who had title to the lot?

A. I wouldn't rightly know.

Q. How much was Mrs. Lannin's mortgage on this lot?

A. About five times as much as it was worth, about \$10,000.00.

Q. And this is a lot other than the Mount Hamilton lot? A. No. I only had one lot.

Q. My question was: What lot did you have, sir, other than the lot on Mount Hamilton?

A. None.

Q. None. All right. Now, when did you buy the Lincoln automobile? A. In October, '53.

Q. As a matter of fact, you had that Lincoln automobile at the time this note and trust arrangement was made? A. It is possible.

(Testimony of George F. Elliff.)

The Court: What?

A. It is possible.

Mr. Shapro: It is possible, he said.

Q. When did you buy a station wagon?

A. I didn't.

Q. You never had a station wagon? [273]

A. My wife owns one but I don't own one.

Q. When did your wife buy a station wagon?

A. She traded her Ford for a station wagon—I guess in May of '53.

Q. May of '53. You were driving the station wagon at the time this May arrangement with Mr. Hodes was made, weren't you?

A. I could have been, off and on, yes.

Q. Did you pay any part of the purchase price for the station wagon from your earnings or the earnings of the business?

A. I don't remember.

Q. In your direct examination the other day, Mr. Elliff, you testified that you owed Mrs. Lannin, your mother-in-law, \$12,000.00. When did you incur the \$12,000.00 obligation, in whole or in part?

A. Well, beginning with 1947.

Q. Beginning with 1947. How much did you owe Mrs. Lannin at the time of the dissolution of your partnership with Hodes?

A. I couldn't honestly say.

Q. Was it \$12,000.00? A. At that time?

Q. Yes.

A. It could very easily have been, yes.

Q. Did you pay Mrs. Lannin any money be-

(Testimony of George F. Elliff.)

tween—on what you owed her—between May of 1953 and October of 1953? [274]

A. May of 1953 to October?

Q. Yes.

A. No, I don't believe I did, sir.

Q. When you testified the other day on direct examination that you owed Mrs. Lannin \$12,000.00, at what time were you referring to?

A. I would say about in May or June—June, I would say, of '53.

Q. June of '53?

A. It was that amount or above at that time.

Q. That amount or above? A. Yes.

Q. It was all represented by a note or notes, as I understood your testimony? A. Yes, sir.

Q. Was it a note or notes, do you recall?

A. I would say notes.

Q. Notes, plural? A. Plural.

Q. Do you know Mr. Hodes' signature?

A. I have seen it several times, yes, sir.

Q. I show you what purports to be a financial statement of Pine Supply Company on the stationery of the First National Bank of San Jose, purporting to be signed by Mr. Louis Hodes, and ask you whether or not you recognize that as Mr. Hodes' signature. [275]

A. It looks like his signature.

Q. It looks like his signature? A. Yes.

Q. Have you ever seen this document before?

A. Yes, I believe I have.

(Testimony of George F. Elliff.)

Q. You know, do you not, that that statement was sent to the Twin City Lumber Company?

A. I believe I took it myself.

Mr. Shapro: We will offer in evidence at this time, if your Honor please, a financial statement of the Pine Supply Company dated April 7—withdraw that—it is dated March 7, 1953, and purports to indicate the financial condition as of April 7, 1953, of Pine Supply Company.

The Court: Exhibit E.

(Thereupon financial statement Pine Supply Company, received in evidence and marked Defendants' Exhibit No. E.)

Q. (By Mr. Shapro): As I understood your testimony the other day, Mr. Elliff, included in the envelope that you left at Mr. Hunter's home on Sunday morning was the financial statement of Mrs. Lannin, is that right?

A. You know, I couldn't swear that it was in there or wasn't in there. It was handed to me by the manager of the Bank of America and it was a sealed envelope and I enclosed it in the large envelope. So I have no knowledge that it was or wasn't. I presume it was. [276]

Q. Do I understand that you never saw this financial statement?

A. I have never seen it, no, sir.

Q. At no time? A. At no time.

Q. Then your testimony the other day that the financial statement of Mrs. Lannin was delivered to Mr. Hunter's residence was based entirely upon

(Testimony of George F. Elliff.)

what the Bank of America manager told you was in the envelope, is that correct?

A. Can I elaborate on that a little?

Q. Yes, sure.

A. Mrs. Lannin phoned her bank and asked them to give me her financial statement, that I would be by to pick it up.

I went by and picked it up. I presumed by all—as a matter of fact that it was in the envelope. Therefore, I could safely say that as far as I know, it was there.

Q. In other words, again, the only basis of your statement that it was, is the fact that you were told it was in there; you didn't read it, you didn't see it?

A. I was told by Mr. Hunter it was there later on.

Q. I see. A. Yes.

Q. Now, do I understand that Mr. Hunter told you that this financial statement was in the envelope that you left at his home on Sunday morning? [277]

A. I asked him what—about Mrs. Lannin's financial statement. He said, "I think it is very satisfactory."

Q. Isn't it a fact, Mr. Elliff, that this financial statement was not given to Mr. Hunter or to the Twin City Lumber Company until at least a week after the warehouse receipts were released?

A. It was given to him on Sunday morning.

Q. Then your testimony is that it was in the

(Testimony of George F. Elliff.)

envelope that you left at his home on Sunday morning? A. I do.

Q. All right. Now, Mr. Elliff, when you bought Mr. Hodes' interest in the partnership out, you expected to continue and you did continue, the business on your own, did you not? A. I did, yes.

Q. And you expected to operate profitably, did you not? A. I had high hopes, yes.

Q. And when, if at all, did you first tell Mr. Ramsey that the Pine Supply Company would not be able to pay its debts to Twin City Lumber Company? A. I don't remember.

Q. Did you ever tell him that?

A. I don't remember that.

Q. Did you ever tell Mr. Hunter that neither you nor Pine Supply would be able to pay what it owed to Twin City Lumber Company? [278]

A. I don't recall saying it, no, sir.

Q. As a matter of fact, Mr. Elliff, you at all times, right up until after June of 1954, assured Mr. Hunter and Mr. Ramsey that you would be able to pay the bill that was owed to them, isn't that true? A. I don't believe so, no.

Q. You don't believe so? A. No.

Q. Now, are you sure?

A. I am certain there were points in there in the lapse in between May and October where it was very *evidence* that I couldn't pay my bills.

Q. It was evident to you, sir. Now, my question—— A. And made evident to them.

Q. How was it made evident to them by you?

(Testimony of George F. Elliff.)

A. Because of the bad checks and because of delinquent payments.

Q. All right. The Court has heard and we will hear more about these bad checks. We understand that. My question, sir, is directed toward your telling Mr. Hunter or Mr. Ramsey that you would not ever be able to pay what you owed to Twin City Lumber Company. A. Ever?

Q. Yes. A. I never said "ever". [279]

Q. You never said "ever"? A. No.

The Court: You never told him that?

A. Ever. There was one occasion when I told him that I couldn't pay him any money until I got my accounts receivable in. I remember that.

Q. (By Mr. Shapro): When was that?

A. But I never said "ever". I was always trying to pay——

Q. You always expected to be able to pay?

A. You bet your life.

Q. I will address myself to another subject. Mr. Elliff, are you sure that by the end of September of 1953 you had not started to build your home?

A. Absolutely.

Q. You are certain? A. Absolutely.

Q. You did not then tell Mr. Ramsey at this meeting in your office, at which the books were examined, that you were building a home?

A. No. That can be substantiated by the loan and the time the permit was taken out.

Q. All I ask is your testimony. A. No.

Q. You said no? A. No. [280]

No. 15201

United States
Court of Appeals
for the Ninth Circuit

RALPH E. WILLIAMS, as Trustee in Bankruptcy of the Estate of George F. Elliff, an individual doing business as Pine Supply Co., bankrupt, and PEARL K. LANNIN,
Appellants,

vs.

TWIN CITY COMPANY, TWIN CITY LUMBER CO., JOHN W. HUNTER, FRANKLIN SUPPLY CORPORATION, SOUTHWEST MANAGEMENT CORP., H. A. COLLINS and WILLIAM R. RAMSAY, Appellees.

Transcript of Record

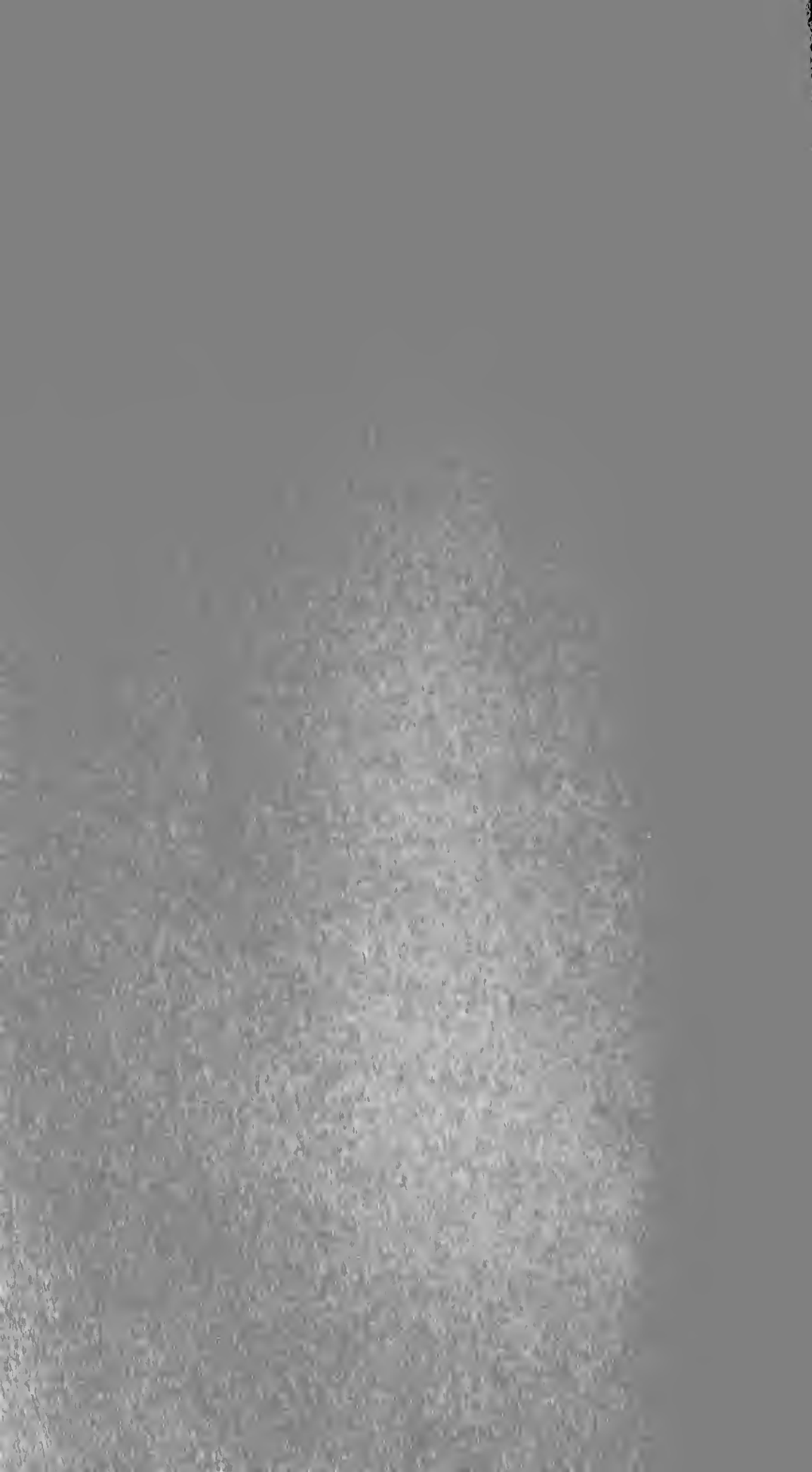
In Two Volumes
VOLUME II.

(Pages 329 to 671, inclusive)

Appeal from the United States District Court for the
Northern District of California
Southern Division

FILED

DEC - 3 1956



No. 15201

United States
Court of Appeals
for the Ninth Circuit

RALPH E. WILLIAMS, as Trustee in Bankruptcy of the Estate of George F. Elliff, an individual doing business as Pine Supply Co., bankrupt, and PEARL K. LANNIN,
Appellants,

vs.

TWIN CITY COMPANY, TWIN CITY LUMBER CO., JOHN W. HUNTER, FRANKLIN SUPPLY CORPORATION, SOUTHWEST MANAGEMENT CORP., H. A. COLLINS and WILLIAM R. RAMSAY, Appellees.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 329 to 671, inclusive)

Appeal from the United States District Court for the
Northern District of California
Southern Division



(Testimony of George F. Elliff.)

Q. You didn't tell him? A. No.

Q. I show you a two-page handwritten letter on the stationery of Pine Supply Company, and without reference to the date because I know the date is not in your handwriting, will you tell me whether or not you wrote that letter? A. I did not.

Q. You did not write that letter?

A. I did not.

Q. Is that not your signature, "George Elliff"?

A. It is not.

Q. Do you know whose handwriting this is?

A. I do.

Q. Who? A. My wife.

Q. Did she write this letter at your direction?

A. I would have to read the letter.

Q. I wish you would, please. (Handing witness.)

A. (Witness examining.) Very good letter.

The Court: What's that?

Mr. Shapro: His comment was, "It is a very good letter."

May I have an answer to the question?

Read it to him, please.

(Question read by the reported:

"Q. Did she write this letter at your direction?") [281]

A. If I recall, I can't—it says, "December" there—I am trying to place when I wrote this letter. But it was after the note, I gather from the conversation, but I can't—I mean, there is no date. It says, "February——"

Q. I say, ignoring the date. All I asked you

(Testimony of George F. Elliff.)

is whether your wife wrote that letter at your instructions. We will get to the time element.

A. Yes. Yes, I would say yes.

Mr. Shapro: Your Honor, we offer in evidence the letter with the understanding that the date which appears on it in someone else's handwriting is not to be considered by your Honor until we establish by some other evidence the source and the circumstances of the date, because undated the letter is material, anyway.

The Court: Exhibit F.

(Thereupon handwritten letter addressed to "Dear John" and signed "George Elliff" on letterhead Pine Supply Company, received in evidence and marked Defendants' Exhibit F.)

Q. (By Mr. Shapro): Mr. Elliff, I show you a letter dated October 6, 1953, addressed to Twin City Company, and purporting to be signed by you. First of all, did you sign that?

A. Yes. It is my signature.

Q. That is your signature? A. It is. [282]

Q. Is that the letter of transmittal that you have referred to as accompanying the documents which you delivered to Mr. Hunter's home on the Sunday morning? A. It is.

Mr. Shapro: We offer the letter, your Honor, dated October 6, 1953, in evidence.

The Court: Exhibit G in evidence.

(Thereupon copy of letter dated October 6, 1953, to Twin City Company, signed George

(Testimony of George F. Elliff.)

Elliff, received in evidence and marked Defendants' Exhibit G.)

Q. (By Mr. Shapro): As to your knowledge, Mr. Elliff, was any request made of Twin City Lumber Company to extend the terms of payment of the \$28,000.00 note?

A. I don't remember. You mean by me?

Q. Yes. A. I don't remember.

Q. Do you recall Mrs. Lannin requesting an extension of time and your signing a letter to that effect? A. It is possible.

Q. It is true, is it not, that the Twin City Lumber Company agreed to extend the first installments on February 1st, 1954, to May 1st, 1954?

Mr. C. H. Jacobs: That calls for the witness' conclusions.

Mr. Shapro: I don't think it calls for his conclusion.

The Court: No. I think it is information, if he knows [283] about it.

A. I will say it is possible. It is possible.

Q. (By Mr. Shapro): In other words, you don't have any personal recollection of the circumstance of a request for an extension?

A. Vaguely I do. There were so many phone conversations.

Q. Tell me, Mr. Elliff, at the time that this \$28,000.00 note was given to Twin City Lumber Company—this was the early part of October, 1953—that's the amount that you owed them at that time, isn't it?

(Testimony of George F. Elliff.)

A. It was \$28,116.00, if I remember.

Q. But you paid them the 116.

A. We wrote a check—I believe Mr. Pasquinelli did.

Q. As a matter of fact, Mr. Elliff, the \$116.63 was paid by money order, was it not?

A. It wasn't paid by me. I don't recall ever writing a check. I think it came from Mr. Pasquinelli's office.

Q. But it was paid from your funds, \$116.63?

A. From the Trustee Account, I believe.

Q. Whatever the source—you say it was from the Trustee Account? Okay. A. Yes.

Q. The note represented the balance of what you owed, the \$28,000.00?

A. In round figures, yes.

Q. That was all for lumber, with the exception of the item [284] of \$21.00 of protest fees and \$127.34, representing interest on the warehouse financing?

A. There is a lot of hidden interest in there that doesn't show up, too.

Q. Just what do you mean by "hidden interest?"

A. Well, it's a long and involved tale. I was paying 14 per cent interest on the money I was getting from Mr. Hunter.

Q. Do you have any computation, any record that indicates how you arrived at that computation? A. Yes, I can break it down for you.

Q. You say you can break it down for me. Can you do it now?

(Testimony of George F. Elliff.)

A. If I had some invoices, I could.

Q. Well, we will give you some invoices. I will show you Plaintiff's Exhibit No. 4, which is a group of invoices (handing witness). A. Okay.

Mr. C. H. Jacobs: You also have another invoice, Mr. Shapro.

Mr. Shapro: I have some others. They will come. But for his purpose, I think he has enough.

A. It was agreed that when we started this—can you hear me, your Honor?

The Court: Not very well.

A. It was agreed when we started this warehousing that I would pay 3 per cent in and above any set cost on lumber. Say [285] it was \$90.00. I would pay \$93.00, roughly, or a hundred I would pay \$103.00. You are normally entitled to two per cent discount, which I was not entitled to.

Q. (By Mr. Shapro): You got the two per cent discount on the 30 per cent when you paid it, didn't you? A. Only.

Q. Only? A. Only.

Q. But you didn't pay the 70 per cent, did you?

A. No. No, that was credited to another account

Q. Go on.

A. Then I was charged 6 per cent interest for the money in the warehouse.

Q. On the 70 per cent?

A. In and above that, which would have been 9, 10, 11 per cent.

(Testimony of George F. Elliff.)

Q. No, I mean—let's not confuse the issue, Mr. Elliff. You know that the 6 per cent interest that was charged to you on the 70—on the warehouse account—was that 6 per cent per annum, not 6 per cent of the face?

A. Roughly, yes, per annum.

Q. Per annum? A. Yes.

Q. You also know that the two per cent discount you are talking about was over—off the face of the invoice, isn't [286] right?

A. Off the face of the invoice?

Q. Off the face of the invoice, 30 per cent of it, yes. A. Only on 30 per cent.

Q. That is all you paid at the time?

A. But I was paying double interest.

Q. We won't—all right, let's not—you and I—argue, the judge won't like it.

A. I don't see how it is important, anyway.

Q. But it well may be important, sir.

A. It might be.

Q. At the time that you gave this \$28,000.00 note, you owed on the warehouse account \$17,416.05, did you not—and I am calling your attention to Plaintiff's Exhibit No. 13. A. I don't know.

Q. Isn't that one of the items, Mr. Elliff, that comprised the \$28,116.63 that you just—

A. Mr. Shapro, they told me repeatedly they would give me a full accounting, which they never gave me, even to this date, they never gave me. I took it on the face value that they were honest people and so did my attorney.

(Testimony of George F. Elliff.)

Q. Was there any reason to doubt that?

A. I had reason to doubt it.

Q. You have it now?

A. It doesn't matter now. [287]

The Court: What?

Mr. Shapro: He said it doesn't matter now.

A. It doesn't matter now, but I had reason to doubt it, yes.

Q. (By Mr. Shapro): Now, Mr. Elliff, I am going to show you—just for the purposes of refreshing your recollection only—

The Court: While you are doing that, Mr. Elliff, as I understand it, the arrival of the figure of \$28,000.00 on this note was made by taking approximately \$10,000.00 in bad checks and the balance due on the warehouse account to arrive at the figure of \$28,000.00 isn't that correct?

A. They were their figures, yes, sir.

The Court: Yes, and you accepted them—that's how you—

A. With the understanding they would send an auditor—

The Court: In order to arrive at the figure of \$28,000.00, that's how you got the \$28,000.00?

A. That is correct.

The Court: All right.

Mr. Shapro: May I have the answer? I am sorry, your Honor.

The Court: He says that was correct.

Mr. Shapro: That's all I wanted.

(Testimony of George F. Elliff.)

Then I don't have to pursue that phase of it, then.

Thank you, sir.

The Court: If you were not listening, the statement of the witness was that he was taking the figures of the warehouse [288] account from the——

Mr. Shapro: Twin City Lumber Company.

The Court: ——taking their figures.

Mr. Shapro: I understand.

Q. You made payments on that note afterwards, too, didn't you?

A. I directed payments on the note.

Q. They were paid from your funds?

A. They were paid from the Trustee's funds.

Q. And the source of the Trustee's funds was your sales, wasn't it, the collection of accounts receivable? A. That's correct.

Q. At the time that the \$28,000.00 note was issued by you to Twin City Lumber Company, all of the merchandise that they had previously held warehouse receipts on, which were in your field warehouse, were released by them within three or four days afterwards? A. That's correct.

Q. Right. No other security was given to them from your assets at that time or any time later, was there? A. No, sir.

Q. Now, Mr. Elliff, your testimony of this morning, you testified that you bought lumber from other concerns after October, 1953, is that right?

A. Correct.

Q. As a matter of fact, you bought over \$7,000.00

(Testimony of George F. Elliff.)

worth of [289] lumber from Harbor Plywood Corporation, did you not? A. I did.

Q. And you bought that on March 22, 1954, did you not? A. In and about that.

Q. You bought it on open account?

A. I did.

Q. And the materials were two per cent ten days—30 days net, is that right? A. No.

Q. You say no?

A. Two per cent 30 days—60 days net.

Q. Are you certain, sir?

A. They adjusted the second—on the second invoice they adjusted it.

Q. The invoice that I am talking about—which, your Honor, is in the files of this court, in the Office of the Referee in Bankruptcy—is an invoice date March 22, 1954, for \$7,380.10, and on its face it says: "Terms 2 per cent 10 days—30 net."

Now, if you want me to bring the invoice here, I will bring it. Do you remember it?

A. It is possible I remember it.

Q. What other people or firms did you buy merchandise from in 1954 on open account?

A. Durable Plywood. [290]

Q. And to what extent, sir, in volume, dollar volume? A. Oh, two or three thousand dollars.

Q. And you bought that—that was on open account? A. Yes, sir.

Q. As a matter of fact, it was the non-payment of the Harbor Plywood invoice of \$7,300.00 that was

(Testimony of George F. Elliff.)

represented—the attachment that closed up your business in June, is that right?

A. I don't know who came first, whether it was he, Harbor, or Al Stockton.

The Court: You stated yesterday that Harbor Plywood was the first attachment.

A. I believe they were the first.

Q. (By Mr. Shapro): Now, after October, 1953, the Twin City Lumber Company exercised no control whatever over your warehouse, is that right? A. No.

Q. It is not right? A. No, they did not.

Q. Oh, they did not exercise it. As far as you know, after October, 1953, the merchandise that you delivered into warehouse, as you described this morning and which warehouse receipts were subsequently issued by Douglass-Guardian Warehouse, all went to Mrs. Lannin, not to Twin City, right?

A. Right. [291]

Q. After May 4, 1953, which is the date of the so-called warehouse agreement with Twin City Lumber Company, it is true, is it not, Mr. Elliff, that no lumber went in that warehouse, field warehouse, other than lumber sold to you by Twin City?

A. Lumber, yes.

Q. Up to—I should qualify—up to October, 1953? A. Lumber, yes, that is correct.

Q. This is correct? A. Yes.

The Court: Well, that question and answer doesn't make it clear to me.

Mr. Shapro: Then I will attempt to clear it up.

(Testimony of George F. Elliff.)

The Court: All right.

Q. (By Mr. Shapro): After the warehouse arrangement between—after the warehouse arrangement went into effect with Twin City, which was May, 1953, and up until the time the warehouse receipts were released in October, 1953, is it or is it not a fact that the only lumber that went into that field warehouse was lumber sold to you by Twin City Lumber?

A. The answer is still lumber, yes.

Q. Now, was there other merchandise in that period delivered into the field warehouse?

A. To my knowledge, not unless it came from Twin City, was it ever warehoused.

Q. Then my question and your answer, I would—— [292]

May I ask the reporter to read my previous question and his answer, because I think he is now changing his answer.

The Court: Well——

Mr. Shapro: I will ask it again.

Q. Mr. Elliff, between May of '53 and October of '53 was there any merchandise delivered into the warehouse, the field warehouse, other than merchandise sold to you by Twin City Lumber Company?

A. No.

Q. Now, go back, if you will, Mr. Elliff, to the meeting in your office the evening of that late September date in 1953 when you and Mr. Baum and Mr. Ramsey went over the books. You testified this morning, if I understood you correctly, that the

(Testimony of George F. Elliff.)

physical checking of the inventory, that is, the looking at the lumber in the warehouse, was done not only that time, but during that week, is that right?

A. I believe that's correct, sir.

Q. Now, at the time, however, namely, the evening of this meeting, was there any lumber, plywood, molding, or any other part of your stock in trade which was not located physically inside the field warehouse? A. I don't remember.

Q. You don't remember whether there was or there was not, or you don't remember whether there was any, which, sir?

A. I mean, I would have to kind of explain that. There [293] might have been lumber outside that hadn't been brought in for the day, which often happened in the summer time if it wasn't raining.

Q. Well, you testified, Mr. Elliff, the other day and Mr. Baum testified the other day, that the basis of the figures given Mr. Ramsey for your inventory that evening was the warehouse receipts which were in the possession of and the control of the bonded representative. A. That's correct.

Q. Right? A. Right.

Q. Now, was there any merchandise, any part of your stock in trade, that was in your premises, either the field warehouse or outside of it, then which was not on warehouse receipt?

A. There might have been some doors, yes, sir.

Q. And there might have been some plywood?

A. If there was, it was a very small amount, maybe five or six pieces.

(Testimony of George F. Elliff.)

Q. Well, assuming the accuracy of your estimate and of Mr. Baum's estimate as to the cost price to you of the merchandise which was on hand that night at \$25,000.00, that was the estimate you both made, assuming that, did that figure cover everything in the nature of merchandise that was in your premises either in or outside of the field warehouse?

A. I would say, Mr. Shapro, that it covered only the [294] purchases made from Twin City Lumber Company.

Q. Then in addition to that, you previously testified there was some merchandise around there—we will get to the location in a moment—that was not purchased from Twin City.

A. It could have been nothing but an insignificant amount, maybe two or three hundred dollars, a few doors and a few sheets of plywood.

Q. But whatever the few doors and a few sheets of plywood were, whatever they might have been as to the quantity or value, they were not included in your and Baum's estimate and the figure given to Mr. Ramsey of the \$25,000.00?

A. I would say no.

Q. They were not. Did you include in that figure any merchandise which was on your premises, had been delivered to your premises prior to that evening and which had not yet been moved into the field warehouse? A. I don't remember.

Q. Would you say there was none—and I am excepting, of course, the few doors and plywood.

(Testimony of George F. Elliff.)

A. I would speculate there was none.

Q. You, in other words, say, your best recollection is there was none? A. Yes.

The Court: Just a moment. [295]

Q. (By Mr. Shapro): Is it your testimony——

The Court: Just a moment, Mr. Shapro. I didn't get the first part of that question.

(Question read by the reported.)

The Court: That doesn't answer the question. The question was: Did you include something? And the answer was: I would say there was none. And that is what I didn't understand.

Q. (By Mr. Shapro): Well, I am assuming—Perhaps I am wrong, too—I am assuming that when you say there was none, therefore there was nothing included in the \$25,000.00 figure for any such merchandise. A. That's correct.

Q. And is it your testimony at this time, Mr. Elliff, that the value of any of your merchandise which was not in the warehouse, and which therefore, from your testimony, just now, was not included in the \$25,000.00 estimate, would not exceed in value a few hundred dollars?

A. That's correct.

Q. Now, Mr. Elliff, in October, 1953, at the time of this meeting and the inspection of the books, whom did you owe money to other than the creditors of Pine Supply Company?

A. Personally, you mean?

Q. Yes.

A. Mrs. Lannin, the Bank of America, Charles

(Testimony of George F. Elliff.)

Lamb, maybe [296] some small bills around—that wouldn't amount to——

Q. How much did you owe at that time, in October, the end of September—I am not trying to confuse you——

A. That's all right.

Q. ——how much did you owe Mrs. Lannin?

A. Yes, sir.

Q. How much?

The Court: Mrs.?

Q. (By Mr. Shapro): Mrs.

A. That had grown to about \$18,000.00 about that time.

Q. By that time it had grown to about \$18,000.00? A. Yes.

Q. That was not recorded in the books of Pine Supply Company?

A. Only \$7,000.00, I believe, was ever recorded there because it was put into the business directly.

Q. And, as a matter of fact, the \$7,000.00 wasn't put in the books of Pine Supply Company until December 31, 1953, was it?

A. I would have no knowledge of that.

Q. Then to your best recollection, all of the indebtedness to Mrs. Lannin, other than possibly \$7,000.00, was not recorded in the books of Pine Supply? A. No.

Q. As of the same time, the end of September, 1953, how [297] much did you owe Charles Lannin?

A. Approximately \$13,000.00.

The Court: What?

(Testimony of George F. Elliff.)

A. \$13,000.00.

Q. (By Mr. Shapro): Was any of that recorded?

The Court: Who is Charles Lannin?

A. He was an associate of mine and Mr. Pasquinelli in a saw mill in Boonville, California.

The Court: Is he related to Mrs. Lannin?

A. By marriage, yes.

The Court: Is he the husband?

A. No, no, it's a brother-in-law.

Q. (By Mr. Shapro): What relation? I didn't get it. A. A brother-in-law.

Q. A brother-in-law?

A. Mrs. Lannin's husband and Charles Lannin were brothers.

Q. Oh, I see. Mrs. Lannin is a widow?

A. Yes.

Q. I see. None of your indebtedness to Mr. Charles Lannin was recorded in the books of Pine Supply, was it? A. No, sir.

Q. The indebtedness that you just described, to the Bank of America, how much was that at that same time? A. In September?

Q. Yes. At the time of this meeting at your office with [298] Ramsey.

A. It was either two or three thousand, Mr. Shapro.

Q. Was that recorded in the books of Pine Supply at that time? A. No.

Q. And this other miscellaneous, personal indebtedness, how much did that amount to?

(Testimony of George F. Elliff.)

A. Petty. I mean, store bills—a hundred, hundred and fifty dollars.

Q. Personal clothing, food bills, stuff like that. That was not recorded in the books?

A. I was indebted in cars, Bank of America, which——

Q. Is that included in the \$2,000.00, the bank there?

A. No, no. That was a note. That was a note.

Q. That was unsecured? A. Unsecured.

The Court: What was unsecured?

A. The note at the Bank of America.

The Court: That was two to three thousand dollars? A. Yes, sir.

The Court: All right.

Q. (By Mr. Shapro): Now, on which car did you owe the Bank of America money, in addition to the two to three thousand dollars?

A. It wasn't the Bank of America. It was the First National [299] Bank.

Q. First National of San Jose? A. Yes.

Q. On what car? A. On the Lincoln.

Q. On the Lincoln?

A. I presume it was either September, October, I purchased it, so it would have been a Mercury or a Lincoln that I owed the balance.

Q. Who was the money owed to on the station wagon, what bank?

A. I think the Ford people. No, that would be the Bank of America. But that would be in my wife's name.

(Testimony of George F. Elliff.)

Q. You didn't sign that paper. A. No.

Q. Now, none of the personal indebtedness that you have just described, with the possible exception of \$7,000.00 to Mrs. Lannin, was recorded in your books, the books that were shown to Mr. Ramsey that night, right? A. No.

Q. In what form, if any, was the existence of this personal indebtedness of yourself made known to Mr. Ramsey that night?

A. I don't know as I ever made it known to Mr. Ramsey. Probably considered it none of his business.

Q. Were the details—by that I mean the amounts of your personal indebtedness—discussed in your presence with Mr. [300] Hunter at the meeting in his San Francisco office in August of 1953?

A. To the best of my recollection, no, not in August.

Q. After October 8, 1953, which was the date of this trust agreement, did you see Mr. Hunter personally?

A. After October 8th? Yes. Yes, I saw him after that.

Q. Do you remember when and where?

A. I saw him on two occasions, in Los Angeles, and one occasion in San Jose in the spring of 1954.

Q. The spring of 1954? A. Yes, sir.

Q. Was Mr. Ramsey present at any one of those three interviews that you recall? A. No, sir.

Q. Do you recall anyone, other than you and Mr.

(Testimony of George F. Elliff.)

Hunter, being present at any one of those three interviews which took place after October 8, 1953?

A. On all three occasions, Mr. Ben Clements was with me.

Q. Mr. Ben Clements? A. Yes.

Q. Who is Mr. Ben Clements?

A. He is the owner of the San Jose Lumber Company.

Q. San Jose Lumber Company? A. Yes.

Q. No business relationship directly with you?

A. Not at that time.

Q. Not at that time.

Q. Are you working for him now?

A. No, sir, I am not.

Q. Now, assuming that there were \$25,000.00 at cost price of lumber in your warehouse at the end of September, 1953, was there any substantial change in that inventory between then and the date that the trust agreement and note were executed and the warehouse receipts release? A. None.

Q. As a matter of fact, the warehouse was closed then, wasn't it? A. That's right.

Q. That merchandise that you say was worth \$25,000.00 plus maybe a few hundred dollars for anything that was not covered by warehouse receipt, was afterwards—was all of it, after the warehouse receipts were released by Twin City, made available to you through the trust by warehouse receipt releases from Mrs. Lannin, is that right?

A. It was.

Q. And it was then sold in the ordinary course

(Testimony of George F. Elliff.)

of your business, except that which remained in the warehouse at the time of your bankruptcy?

A. That is correct.

Q. Now, in the ordinary course of your business, I think [302] you estimated that your gross markup averaged between 20 and 25 per cent, is that right?

A. Overall. I always tried to average about 20.

Q. Well, would you say that your average was less than 20 or was it as Mr. Baum testified?

A. It fluctuated.

Q. Between 20 and 25?

A. On some items we get 30, some items just 10.

Q. We are using the word "average."

A. Averaged 20 per cent. I have always maintained——

Q. Or better on gross—now, this is gross.

A. I don't think there is any better.

Q. You don't think it was any better?

A. No.

Q. Well, then on that basis the \$25,000 cost price inventory, on a 20 per cent markup would be worth \$30,000.00 in the ordinary course of business, gross? A. Gross.

Q. Gross. A. Right.

Q. Now, the receivables at the time of this late September meeting at your office, how much were they?

A. They were just about even with the inventory, as I recall.

Q. About the same amount? [303]

A. Yes, twenty-four something, I believe.

(Testimony of George F. Elliff.)

Q. In other words, between twenty-four and twenty-five thousand? A. Correct.

Q. And the amounts owed by Pine Supply to trade creditors, other than Twin City Lumber Company, was about ten, eleven thousand at that time?

Mr. C. H. Jacobs: What?

Mr. Shapro: The September meeting, the late September meeting.

Mr. C. H. Jacobs: I see.

A. I wouldn't put it quite that high, I don't believe, Mr. Shapro.

Mr. Shapro: Q. You don't think it was quite that high? A. No, I don't believe so.

The Court: What do you think it was, approximately?

A. Taking everything, I mean overall, including what was owed from the partnership, it probably wouldn't exceed eight, I don't think.

Mr. Shapro: Q. It wouldn't exceed eight. All of eight that you are speaking of, approximately \$8,000.00 was recorded in the books of Pine Supply, was it?

A. It should have been by that time, yes.

Q. Well, I am not trying to make an accountant out of you. In other words, it was either recorded in the books or there [304] were unpaid invoices that were there for that month——

A. That's correct.

Q. And that would be about \$8,000.00?

A. I would say.

(Testimony of George F. Elliff.)

The Court: You want to take a recess, Mr. Shapro?

Mr. Shapro: All right, your Honor.

(Short recess.)

Mr. Shapro: Q. Mr. Elliff, I show you a letter consisting of two pages on the letterhead of Twin City Lumber Company, dated February 26, 1954, and ask you if that bears your signature and that of your wife? A. Yes, it does.

Q. And will you turn to the second page and tell me whether or not it bears the signature of mother-in-law, Pearl K. Lannin?

A. Yes, it does.

Q. Now, will you read that letter, please, to refresh your recollection on the subject about which I interrogated you earlier this morning, before I ask you a question in connection with it.

A. (Witness examining) Yes, sir.

Q. Now, is your memory refreshed now to the effect that there was an extension asked for by you, consented to in writing by Mr. Lannin, and given by Twin City Lumber for the first installment, postponing payment from February 1, '54, to [305] May 1, '54 on the \$28,000.00 note?

A. Well, Mr. Pasquinelli made the request. I think it was granted through Mr. Pasquinelli.

Q. But the point is: there was such a request made? A. There was.

Q. On your behalf? A. On my behalf.

Q. And it was granted?

A. That's right, sir.

(Testimony of George F. Elliff.)

Mr. Shapro: We offer in evidence the letter of February 26, 1954.

The Court: Exhibit H.

(Thereupon copy of letter of Twin City Lumber Company to Elliff, February 26, 1954, received into evidence and marked Defendants' Exhibit H.)

Mr. Shapro: Q. I show you, Mr. Elliff, what purports to be a financial statement of your dated April 7, 1953, and ask you if it bears your signature.

A. It does.

Q. That statement was given or transmitted by you to Twin City Lumber Company, was it not?

A. I believe it was, yes.

Q. And I call your attention to the fact that among the assets listed by you is a half interest in Pine Supply Company at 6500; that is the same partnership, of you and Mr. Hodes, that we talked about heretofore?

A. Yes. [306]

Q. The answer was what? A. Yes.

Mr. Shapro: We will offer, if your Honor please, a financial statement of George Elliff dated April 7, 1953, in evidence.

The Court: Exhibit I.

(Thereupon the financial statement of George Elliff dated April 7, 1953, was received into evidence and marked Defendants' Exhibit I.)

Mr. Shapro: Q. Mr. Elliff, who asked Mrs. Lannin to endorse and guarantee the payment of this \$28,000.00 note to Twin City?

A. I believe I did.

(Testimony of George F. Elliff.)

Q. Prior to the date that the note was issued, to your knowledge, did any representative of Twin City Lumber Company meet Mrs. Lannin?

The Court: Prior to what?

Mr. Shapro: Prior to the date of the note.

A. I believe Mr. Ramsey met her, If I am not mistaken.

Q. Was any request made of Mrs. Lannin to sign this note or guarantee this note by anybody, to your knowledge, on behalf of or by Twin City Lumber Company?

A. Not to my knowledge.

Q. As a matter of fact, Mr. Elliff, you know, don't you, that neither Mr. Ramsey nor Mr. Hunter nor Mr. Collins ever [307] met Mrs. Lannin until late in 1954? By "late," I mean June or July.

Mr. C. H. Jacobs: To which we object, of course, your Honor, as calling for the opinion and conclusion of the witness. He couldn't possibly have known that.

Mr. Shapro: He could, if he were there. I said as far as he knows.

Mr. C. H. Jacobs: Well, I didn't understand you to say that.

Mr. Shapro: I think my question embraced that.

Mr. C. H. Jacobs: I thought counsel said, "As a matter of fact, you know, do you know, that they did not?"

The Court: If the witness understands the question, he may answer.

A. I know that some time Mr. Hunter went to

(Testimony of George F. Elliff.)

Mrs. Lannin's house—I don't know when it was——

Mr. Shapro: Q. That was to demand payment of a part of the note, wasn't it?

A. I don't know.

Q. You don't know. Mrs. Lannin's guarantee on this note was done at your request and as an accommodation to you, was it not?

A. It was done on the request of Mr. Hunter.

Q. Let me get this straight. It is your testimony that——

A. To me. To me. [308]

Q. ——Mr. Hunter asked you to ask Mrs. Lannin to endorse this note?

A. Absolute.

Q. And, as I understand it, Mr. Hunter had not at that time ever met Mrs. Lannin, right?

A. No.

Q. Now, you heard Mr. Baum's testimony yesterday, didn't you?

A. Yes. (Shaking head.)

Q. You are shaking your head?

A. Yes.

Q. You heard his testimony that in the meeting with Mr. Hunter in San Francisco in the latter part of August, 1953, he suggested a deal, a proposal, whereby the warehouse was to be released so you would be more fluid with it and the obligation to Twin City would be funded over a period of three years.

A. That's correct.

Q. Wasn't that the first effort on your behalf made by anybody to procure the release of the warehouse to you?

A. I believe that is correct.

Q. And isn't it a fact that on the weekend, the Friday or the Saturday preceding the meeting at

(Testimony of George F. Elliff.)

Mr. O'Connor's office when the not was prepared, that the suggestion that Mrs. Lannin might sign or could sign or warranty your note for \$28,000.00 was made by you to Mr. Ramsey by telephone?

A. I recall calling Mr. Ramsey but the suggestion had come earlier than that. It had come prior.

Q. From whom?

A. In conversation with Mr. Hunter.

Q. And when was that, and where did it take place?

A. It was about the time of this \$7,000.00 check was being discussed so much.

Q. That would be in September?

A. Early September, I would say, yes.

Q. Now, Mr. Elliff, I am going to repeat the process that the Court did earlier, and call your attention to the fact that the check is dated September 18th, it was protested on September 27. You *still the* conversations took place in early September about the check having bounced?

A. No, I can't say that. The figures don't lie.

Q. All right, then, Mr. Elliff—

A. Let me change that by saying it was prior to the week that Mr. Ramsey spent with me in San Jose.

Q. All right. In other words, in the telephone conversation one or more of the telephone conversations that you had with Mr. Hunter concerning this \$7500.00 bad check, a suggestion was made that Mrs. Lannin might sign your note?

(Testimony of George F. Elliff.)

A. It was made that someone secure—which he meant, like my mother-in-law, Mrs. Lannin——

Q. Did he use the words “like your mother-in-law”? [310]

A. Yes. Yes.

Q. And this is Mr. Hunter’s suggestion?

A. Yes.

Q. And it is not a fact, then, Mr. Elliff, that the first time the guarantee of your note—of any note by you to Twin City Lumber Company by Mrs. Lannin did not come from you?

A. I got a little mixed up there.

Q. I will repeat it. I twisted it.

Was the first suggestion that Mrs. Lannin would sign a note for you to Twin City Lumber Company made by you? A. No.

Q. Who made the first suggestion that a note of yours be guaranteed by Mrs. Lannin?

A. By Mrs. Lannin, or someone equally secure, came from Mr. Hunter.

Q. By Mrs. Lannin or someone equally secure?

A. Yes.

Q. Then when you testified a few minutes ago that you asked Mrs. Lannin to sign this note at Mr. Hunter’s request, it was pursuant to the request you have just outlined, namely Mrs. Lannin or somebody equally secure, is that right?

A. The seed was planted by Mr. Hunter.

Q. But you don’t want this Court to understand that Mr. Hunter told you to go ask Mrs. Lannin? A. Oh, no. [311]

(Testimony of George F. Elliff.)

Q. Mrs. Lannin to sign this note?

A. Oh, no, I did that on my own.

Q. How long, Mr. Elliff, did this meeting with Mr. Ramsey at which you and Mr. Baum attended at the Bermuda Palms in San Rafael last?

A. Oh it was late in the evening and I would say that roughly an hour, perhaps.

Q. Was anything done at this meeting but discussion—I mean by that, did you have a meal or anything? A. A drink, maybe.

Q. You didn't eat dinner?

A. No, I don't think so.

Q. How long did the meeting at San Jose on the latter part of September, 1953, take?

The Court: Well, now, the evidence is he was there every day for a week.

Mr. Shapro. But I am referring—no, your Honor. I am sorry. That represented the taking of the inventory, the checking of the inventory I am referring to the meeting, one meeting on the evening when the books were shown to Mr. Ramsey.

The Court: That isn't my recollection of the testimony. That went on for a period of a week, he was there. A. That's right.

Mr. Shapro: In other words—I am wrong [312] now; I have been corrected by the Court and you confirm it, that the showing of the books to Mr. Ramsey occupied more than one session?

A. He made the request to get things together, he wanted to see the inventory, he wanted to know the condition of the business, how it stood finan-

(Testimony of George F. Elliff.)

cially, how the accounts receivable were, whether the inventory was in place, in warehouse, et cetera, and the reason it is so vivid in my mind is that Mr. Ramsey was so eager to go one vacation that particular week and he couldn't get on vacation for attending to this business for Mr. Hunter.

Q. And how many times then did he visit you, visit your premises during that week and look over books?

A. I believe all but one day throughout that whole week.

Q. And Mr. Baum was there every day then, too? A. Yes, Mr. Baum was there.

Q. And Mr. Ramsey still hadn't gone on his vacation the night you went over to San Rafael, had he? A. No, not yet.

Q. During the period after October 8th of 1953 when you undertook to take merchandise or have merchandise released to you from the field warehouse, with whom did you take that up?

A. After October 8th?

Q. Yes, sir. [313]

A. Well, it was plainly stated in the trustee agreement.

Q. I am not asking you what the agreement said, sir. I am asking you what you did.

A. To release inventory from the warehouse?

Q. When you wanted to fill an order and get merchandise out of the warehouse, what did you do?

A. Loaded it on the truck and took it out. It was that simple.

(Testimony of George F. Elliff.)

Q. It was that simple?

A. It was that simple.

Q. There was no bonded representative of the warehouse company, there at that time?

A. Oh, yes, at all times.

Q. Again, I repeat, what did you do to get merchandise out of the warehouse?

A. The same as I had done when Mr. Hunter had receipts. I loaded it on the truck and took it out.

Q. And there were no documents signed?

A. Yes, there was always an invoice.

Q. That is what I am trying to find out.

A. The same procedure that we follow in any—

Q. But the Court isn't interested in what we do in any business. The Court is interested in what you did in this business.

A. Do you want me to make an example? [314]

Q. No. You tell the Court, if you please, in response to my question——

The Court: Well, Mr. Shapro, you are trying to show that he had nothing to do with your company.

Mr. Shapro: Exactly.

The Court: Isn't that what you are trying to show?

Mr. Shapro: Exactly.

The Court: Why don't you ask directly about that? I can understand what you are getting at.

Mr. Shapro: I am sure your Honor can. I am not sure the witness can.

(Testimony of George F. Elliff.)

Q. Mr. Elliff, after October 8, 1953, you never consulted Twin City Lumber Company in connection with any dealings with the warehouse?

A. I did not.

Q. Did you consult Mrs. Lannin directly?

A. From time to time, yes.

Q. Didn't you testify, Mr. Elliff, the other day, on direct examination, that—and I am going to attempt to use your very words—that you possibly suggested the arrangement that resulted in the \$28,000.00 note on the trust agreement?

A. May I have that question again?

(Question read by the reporter.)

Mr. C. H. Jacobs: Wouldn't the record be the best evidence? [315]

Mr. Shapro: This is cross examination, your Honor. I want to test his recollection, even since yesterday.

The Court: I will permit the answer.

A. Yes, I did.

Mr. Shapro: Q. Isn't it a fact, Mr. Elliff, that between May of 1953, when the warehouse arrangement with Twin City was set up, and at least up until October 8, 1953, that on several occasions you told Mr. Ramsey and Mr. Collins, or either of them, at the office of Twin City Lumber Company in San Francisco, that Pine Supply would always pay its bills and would come out on top?

A. You left out part of the statement.

Q. Please answer that question. If it wasn't said that way, then say so, I mean, whatever the

(Testimony of George F. Elliff.)

fact is. A. It was not said that way.

The Court: You may answer and then explain, if you desire.

A. It was a continuation to that statement, if we were given a free hand to operate the business the way it should be operated.

Mr. Shapro: Q. In other words—and what did you mean by “given a free hand”? Warehouse?

A. No—no, sir.

Q. What did you mean?

A. I meant that this continual being chopped off when there [316] was an urgent order to be filled and there was material waiting to be shipped, because of some little, petty fault that had come up, or delinquent payment by a few days, and a customer got disgusted and had left me with some inventory which I couldn't use.

Q. In other words, Mr. Elliff, you felt and stated to them at these conferences that you needed some relief in the form of having merchandise released from the warehouse, even though you were delinquent on the warehouse payments, on the open account items, is that right? A. That is correct.

Q. And do I understand you to say that those delinquencies were only a matter of a few days?

A. In some cases, yes.

Q. As a matter of fact, Mr. Elliff, your account, as the record shows and as you testified on direct examination, with Twin City Lumber Company, was always delinquent?

A. It was understood that it would be.

(Testimony of George F. Elliff.)

Q. Will you answer my question? Was it or was it not?

A. I don't know, without looking at the record.

Q. The condition that you placed upon your ability, as I understand your testimony, to continue in business and pay the bills, was to have Twin City Lumber Company give you more leeway with your delinquencies?

A. They were the ones that suggested the business in the [317] first place and that was the agreement in the beginning.

Mr. Shapro: May I have an answer to the question, your Honor?

A. That is my answer to the question.

The Court: Read the question, please, and you answer it and explain it afterwards, if you can.

(Pending question read by the reporter.)

Q. (By Mr. Shapro): Do you understand the question?

A. Yes, I do. I am just trying to give you what I consider the right answer.

Not in the sense of delinquencies, no. More leeway, yes.

Q. I asked you before and I ask you again: What did you mean by "more leeway?"

A. A greater inventory, a more diversified inventory. The original proposal that they had made covered this and never was fulfilled.

Q. When you say the original agreement, I assume you refer to an oral understanding?

(Testimony of George F. Elliff.)

A. No. This understanding (indicating document.)

Q. Will you point out—you are referring now to——

A. It's very simple.

Q. You are referring to Plaintiff's Exhibit No. 1. Will you point out to me the part of that agreement, the letter dated May 4, 1953, to which you referred in your last answer?

A. Mr. Shapro, it is the other letter that we had here. [318]

Mr. C. H. Jacobs: To save time——

The Court: Exhibit——

Mr. C. H. Jacobs: I make this objection, this is irrelevant, incompetent, immaterial. I may be in error, but as far as I can see, it has nothing to do with the issues of this case.

The Court: This is cross examination. Objection overruled.

Q. (By Mr. Shapro): I am now handing—perhaps this is the one, Mr. Elliff—Exhibit No. 2 (handing witness).

A. No. We just had it here. This isn't it, either. It is the one prior to that.

Q. Well, the one prior is Exhibit 1, which is May 4. That is the first agreement.

A. The last one we had before then, sir.

Q. It it one of these letters in Exhibit 3?

A. No, no. It is one of these. Here it is.

Mr. Shapro: The witness is pointing, if your Honor please, to paragraph number one on the first

(Testimony of George F. Elliff.)

page of the letter marked Plaintiff's Exhibit No. 1, which reads——

The Witness: Which reads: That all lumber, moldings, plywood and door jambs purchased from us at 70—those are the items that I brought up.

Mr. Shapro: The witness only read part of the paragraph to which he points. It reads as follows:

“We will advance you 70 per cent of our invoice price on all lumber, moldings, plywood and door jambs purchased from us. This 70 per cent will be advanced against Douglass Guardian Warehouse receipts.”

Q. Now, is it your testimony, Mr. Elliff, that after May 4, 1953, at any time the Twin City Lumber Company failed to give you 70 per cent credit on a warehouse receipt basis for merchandise, plywood, door jambs or moldings sold to you by them?

A. Not the failure——

Q. Did you say “no”? A. I said “No.”

Q. All right.

A. The failure in that particular paragraph is that they did not provide me with the door jambs and the moldings and the plywood that they had agreed.

Q. You said that before. I want you to tell me where and how and in what manner they agreed to furnish you any amount of door jambs or moldings, that is what I am asking you.

A. They didn't supply me with any.

Q. Did you order any? A. I certainly did.

Q. You certainly did? A. Yes. [320]

(Testimony of George F. Elliff.)

Q. In writing? A. Yes.

Q. Were they of their manufacture?

A. They were not very strong in the manufacture end of the lumber products business, anyway.

Q. And you knew that when you first made the warehouse arrangement with them, didn't you?

A. I knew that, and also was told and agreed—the subject—we drew this up, that door jambs and plywood would be made available to the warehouse.

Q. And that agreement preceded the date—that you are talking about—was an oral agreement that preceded the letter of May 4, 1953, is that right?

A. That's correct.

Q. But it is true, is it not, that all of the lumber, moldings, plywood or door jambs which Twin City Lumber Company sold to you after May 4, 1953, was put on the 70 per cent warehouse basis?

A. Only lumber and moldings—is the only thing they ever sold me.

Q. They never sold any plywood, never sold any door jambs, right? A. Right.

Q. You bought plywood elsewhere?

A. Not until after we had signed the trustee agreement. [321]

Q. Didn't you testify a few moments ago that you had some plywood on hand in the end of September?

A. Not in quantity. We bought some, various sheets of plywood, yes, sir.

Q. I merely asked you if you bought plywood elsewhere. The answer is yes?

(Testimony of George F. Elliff.)

A. I am thinking in carloads. No, we never bought carload.

Q. Did you buy door jambs elsewhere?

A. In October, I believe we did.

Q. Not before? A. I don't believe so.

Mr. Shapro: I think that is all.

Further Redirect Examination

Q. (By Mr. R. N. Jacobs): Mr. Elliff, I show you Plaintiff's Exhibit F, letter that has been referred to as having been written by your wife at your direction.

The Court: That is Defendants' Exhibit F.

Mr. R. N. Jacobs: Defendants' Exhibit F. Excuse me. Defendants' Exhibit F.

Q. And I call your attention to the second page, the clause that says, " * * * because in spite of everything you said * * *"

Can you tell me what that refers to?

A. It referred to a conversation that Mr. Hunter had upset me a great deal over, and by using such violent and vile language over the phone. [322]

Q. When was that conversation held?

A. I can't tell you because there is no date on this letter, unfortunately.

Q. Approximately what time?

A. Well, we speak of "December."

The Court: We speak of what? I don't hear you.

A. We speak of "December"—I think "December" in here, when the check—the 18th of December—collections from the—. So it must have been around the—December the 18th.

(Testimony of George F. Elliff.)

Q. (By Mr. R. N. Jacobs): What year?

A. 1953.

Q. That was after the date of the October transaction?

A. Yes, sir.

Q. What was that conversation, can you tell me?

A. Mr. Hunter had called me in regards to the fact that we hadn't paid these last invoices of lumber or molding that they had shipped in November.

Q. What had he said in that regard?

A. Well, he became very violent about everything and he made some threats and said that he was never used to doing business in this way, that he had never seen me lie before, and I denied I lied—and it was very uncomplimentary—that he accused me of such—because I had no intention of lying; that if I had the money, I would have paid him long before. And that's about the gist of it.

Q. When this warehouse was set up in May of 1953, that is when the warehouse receipts were issued to Twin City Lumber Company, what merchandise did those warehouse receipts cover?

A. They covered all merchandise that Mr. Hodes and I had in our possession at that time.

Q. Can you tell me what the setup—the physical setup—of the warehouse was?

A. The enclosure.

Q. Yes.

A. It was a tin building which consisted of 6400 square feet.

Q. Were there any other buildings?

A. There was a building to the annex of the

(Testimony of George F. Elliff.)

building, a shed-roof type building, open face, and under the warehouse arrangement I think we had 30 to 60 feet on three sides of the building for storage, in addition to that, and for handling and sorting lumber.

Q. Was the total amount of the storage space, including the outside building, under the warehouse arrangement? A. Yes.

Q. I think you testified as to any merchandise that might have been on hand at the time Mr. Ramsey was in San Jose in the latter part of September. Could you clarify that for me? Could there have been any merchandise in the warehouse which was not examinable by Mr. Ramsey? [324]

A. I personally showed Mr. Ramsey all the stock in trade in the warehouse, in the warehouse during that week.

Q. You further testified that Mr. Ramsey looked at the warehouse receipts, is that correct?

The Court: Warehouse what?

Mr. R. N. Jacobs: Warehouse receipts.

Q. Is that correct?

A. If he didn't look at them, Mr. Jacobs, he certainly had access to them, both from ours and from their own records, which they had copies of themselves.

Q. Was there any merchandise in the warehouse that was not under warehouse receipt as of that time? I am referring to the latter part of September when Mr. Ramsey was in——

A. If there was any, it was awfully minute. It

(Testimony of George F. Elliff.)

might be, as I said there to Mr. Shapro, two or three hundred dollars in various little doors or plywood that was—but that would be the only thing.

Q. Was there any stock in trade located outside of the warehouse, in front or in back, which would not have been within the warehouse setup?

A. There was some low-grade pine that we had had from the first shipment, as I recall, from Ukiah Pine Company, which was shipped by Twin City, in the back under the shed at that time, yes.

Q. Was that within the warehouse as it had been set up? [325]

A. It was still covered by warehouse receipts.

Q. Was there any stock in trade located in front of the warehouse that may have just come in on a shipment?

A. I don't believe so, because our agreement called for all purchases through Twin City and they had cut off shipments in August, if I recall.

Q. Will you clarify what you just said about "our agreement with Twin City" as calling for purchasing solely from Twin City—I believe that is the essence of the statement?

A. That is correct.

Q. Would you clarify that for the Court?

A. In entering into the agreement in May with Mr. Hunter, Mr. Hodes and I had agreed that any purchases made by Pine Supply Company would be through Twin City Lumber Company.

(Testimony of George F. Elliff.)

Q. Was that part of the agreement carried out by you?

A. Outside of LCL shipment and—I mean LCL, less than carload—and maybe a few doors or a piece of plywood here and there.

Q. Did that amount to any substantial purchases?

A. Not even one per cent of the entire gross business.

Q. Was there any of that merchandise purchased by those means on hand as of September, the latter part of September?

A. To the best of my recollection there were a few pieces of plywood, maybe five or six, and a few doors, but it wouldn't exceed two or three hundred dollars at the most. [326]

Q. You further stated that you did not receive any deliveries after August, of merchandise, is that correct?

A. Not from Twin City Company or anyone else, as I recall.

Q. Why was that?

A. I had given my word to Mr. Hunter in the elevator at their office that—he asked me to promise that I would not make any further purchases from anyone else because they were holding up all further shipments until this thing was settled.

Q. Could you explain what you mean by Mr. Hunter stated to you at the elevator outside of their office—when was that?

(Testimony of George F. Elliff.)

A. We had left Mr. Hunter's office and I think——

Q. What occasion was that?

A. This was the occasions that Mr. Baum and I had gone up there and proposed a long-time pay-off on a note proposition with Mr. Hunter.

Q. Was that some time in August?

A. Some time in August.

Q. Can you place it where it was in August?

A. What day?

Q. Yes. A. No, I couldn't, Mr. Jacobs.

Q. You had a conversation with Mr. Hunter in Twin City offices in San Francisco? [327]

A. That is correct.

Q. And was it after that conversation had ceased that you left the office, is that correct?

A. We started to leave the building and I think it came as an afterthought to Mr. Hunter, and as we were stepping into the elevator he came out the door and asked me to step out and he talked to me and he asked me in his own words if I would promise not to buy merchandise from anyone else until this thing was settled, which I did.

Q. You stated that was part of your agreement prior to this time. Was he aware of the fact that you had purchased any merchandise from anyone else?

A. Perhaps not, Mr. Hunter. But I had made it known to Mr. Collins and Mr. Ramsey upon occasions.

Q. How had you done that?

(Testimony of George F. Elliff.)

A. In person. We had ordered doors and we were picking them up and we had them sold.

(Thereupon an adjournment was taken until the hour of 2:00 o'clock p.m. of this day.)

Wednesday, November 23, 1955

2:00 P.M.

Mr. Shapro: If your Honor please, for the record, in consideration of a stipulation with counsel for the opposing parties, that the records of Mr. Elliff, to which reference was made by the witness Baum yesterday as having been exhibited to Mr. Ramsey, either at a meeting or at the end of a series of meetings in a week in the latter part of September, 1953, were of considerable bulk, we on behalf of the defendants, are willing to withdraw our request for the production by the witness, by me, and by the plaintiff, of the records to which he referred in testimony the other day.

Mr. R. N. Jacobs: We will stipulate for the trustee plaintiff that the records that were referred to by Mr. Baum—I think this will cover it, counsel—the records that were referred to by Mr. Baum in his testimony were extremely bulky and voluminous.

Mr. Shapro: Correct.

Mr. R. N. Jacobs: We will so stipulate for the defendant and cross-complainant Pearl K. Lannin.

GEORGE F. ELLIFF

resumed, previously sworn.

Further Redirect Examination—(Continued)

(Testimony of George F. Elliff.)

Q. (By Mr. R. N. Jacobs): Mr. Elliff, I believe we were discussing when it came time for the noon recess the fact [329] Mr. Hunter had said to you at the elevator outside of his office in San Francisco, that: "George, I want you to promise not to get any merchandise from anyone but me." Is that substantially correct?

Mr. Shapro: Until all of this was straightened out.

Q. (By Mr. R. N. Jacobs): Did you add, "Until all of this was straightened out"?

A. That is correct.

Q. You also testified that at the May meeting with Mr. Hunter you had agreed with Mr. Hunter and he had agreed with you that you would accept no other merchandise but that merchandise shipped to you by the Twin City Lumber Company, is that correct?

A. That is correct.

Q. Did you accept any other merchandise except the little pieces that you mentioned, plywood and door jambs that did not amount to more than a few hundred dollars?

A. Not up until that time, no.

Q. Was there any conversation that took place in Mr. Hunter's office that you can recollect that would have caused Mr. Hunter to come out and say that to you?

Mr. Shapro: If your Honor please, I am going to object to that as argumentative and calling for the conclusion of the witness.

The Court: I think it does, counsel. [330]

(Testimony of George F. Elliff.)

Mr. R. N. Jacobs: All right, I will rephrase my question, your Honor.

Q. Did you have any conversation in Mr. Hunter's office regarding purchasing merchandise from anyone else?

A. I believe we did, sir, yes.

Q. Can you tell us what the substance of that conversation?

Mr. Shapro: Time, place and parties present, please.

The Court: It was in the office in San Francisco in the same meeting you are talking about?

Mr. R. N. Jacobs: This is continuing that question.

Mr. Shapro: The May meeting?

The Witness: August.

Mr. R. N. Jacobs: The August meeting in San Francisco.

A. My chief complaint as to why the business had not flourished as we had anticipated was the lack of a steady source of supply of the materials that I had requested, of the materials that we had agreed on in May, and it was the general complaint on my part that I was very unsatisfied with the reaction of the Twin City Lumber Company as a whole, and I think—I am sure I made the statement at that time that I was so dissatisfied, if I had the means to pull out of this deal, I would, for the sake of the business and the satisfaction that I could prove to them that it could make more money than it had been capable of doing, due to

(Testimony of George F. Elliff.)

the fact that we were so strangled by their restrictions and always being cut off, [331] which probably brought about this statement by Mr. Hunter when he came up and said, "George, I want you to promise me not to buy anything from anybody else."

Q. Did you buy anything from anyone else after that conversation up to the time of the October transaction? A. No, sir, I did not.

Q. Mr. Elliff, I am going to ask you to go back a long period of time, and I understand your recollection will probably be rather vague, but if you can, tell us in as close as possible words, what was said at the transaction that I am going to mention. The Court will appreciate it.

Did you have any conversations with anyone in connection with Twin City Lumber Company or Twin City Company regarding your financial affairs?

Mr. Shapro: What was that?

Q. (By Mr. R. N. Jacobs): Did you have any conversations in regard to your financial affairs with anyone who was connected with the Twin City Lumber Company or the Twin City Company?

Mr. Shapro: If your Honor please, I object to that question as being entirely too general.

The Court: He can answer yes or no to that.

The Witness: I will have to answer yes.

Q. (By Mr. R. N. Jacobs): Did you have a conversation some time in 1952 with a man by the name of Collins? [332] A. I did.

(Testimony of George F. Elliff.)

Q. Was that the same Collins you have mentioned previously in your testimony?

A. Mr. Howard A. Collins, yes.

Q. When did that conversation take place?

A. That I can remember very well. It was Halloween Day, 1952, October 31st, in other words.

Q. Where did that conversation take place and who was present?

A. He and I, and it took place between San Mateo, California, and Madera, and from Madera back to San Mateo.

Q. Were you traveling in an automobile?

A. Yes.

Q. Can you tell us substantially that part of the conversation that you had on that occasion with Mr. Collins relating to your financial affairs at that time?

A. We discussed pretty openly my financial affairs as Hac, as I referred to him, I considered was a good friend of mine, and he had some marital difficulties about that time and he openly discussed those, and I openly discussed my affairs, and the indebtedness I had with Coast Range Lumber Company, which he was quite aware of, because he had been the instigator, the connection between John Hunter and myself in the beginning, and I told him it had broke me, which he was quite aware of, anyway, and I was quite in debt and was [333] having a lot of financial trouble otherwise.

Q. Did you tell him the amount of indebtedness of Coast Range Lumber Company at that time?

(Testimony of George F. Elliff.)

A. I am quite sure I did, yes, sir.

Q. What was that amount?

A. It was in the neighborhood of \$70,000.00.

The Court: How much?

A. \$70,000.00.

Q. Do I understand you then told him you were indebted to Coast Range for \$70,000.00?

A. Coast Range was indebted for \$70,000.00, of which I was only responsible for one-sixth of that amount.

Q. (By Mr. R. N. Jacobs): Did you tell him at that time that you were responsible for one-sixth of that indebtedness. A. I think so.

Q. Did you tell him about any other indebtedness that you had at that time?

A. Yes, I was very much concerned at that time about this note that I owed at the Bank of America because they were putting a bit of pressure on me, which was a personal responsibility to me and to my mother-in-law, Mrs. Lannin.

Q. What was the amount of that note?

A. \$5,000.00 at that time.

Q. Did you tell him the amount of that note?

A. I think so, yes. [334]

Q. Did you tell him what connection your mother-in-law had with that note? A. Yes.

Q. What was that connection?

A. She had co-signed it.

Q. Any other indebtedness that you discussed with Mr. Collins at that time?

A. I remember I was having trouble with the

(Testimony of George F. Elliff.)

Veterans Administration over this house. I remember telling him about that. I was about to lose the house I was living in.

Q. What did you tell him in that regard?

A. I told him I was delinquent in payments and they were about to foreclose on it.

Q. Did you have any discussion with Mr. Col-
lions at that time regarding your assets, what you
owned? A. Yes, I did, yes.

Q. Did you tell him what you owned?

A. I told him I was trying my best to sell these
lots which I had on Mount Hamilton Road, of
which I had three acres at that time.

Q. Did you tell him essentially what those lots
were composed of?

A. I don't know whether I did or not.

Q. Did you discuss the value of the lots with
him at all?

A. I do recall, I think, telling him that it had
increased [335] a great deal since I bought them,
because I bought them early in 1947, and real es-
tate had continued to climb in value up there.

Q. Did you tell him what that increase amounted
to or what the value of them was after the in-
crease?

A. I could have. I don't know. I could have, yes.

Q. What was the first contact you had with Mr.
Hunter? A. My first contact?

Q. Yes.

A. Was in the spring of 1951 at the Fairmont
Hotel here in San Francisco.

(Testimony of George F. Elliff.)

Q. Was that in regard to the Coast Range Lumber Company? A. It was, yes.

Q. Going back one moment to Mr. Collins, did you and Mr. Collins discuss any financial dealings between Twin City Lumber Company and any business which you were connected with at the time of this conversation that you just related?

The Court: What conversation?

Mr. R. N. Jacobs: The conversation——

The Court: 1952?

Mr. R. N. Jacobs: Yes.

A. I told him that we, meaning Mr. Hodes and I, were going to form a partnership the following day, which would have been November 1st, in Abbott-Lane Pine Supply. He had been aware of it, because I had had conversations over the phone [336] with him, and that was the reason we made this trip this particular day was to buy some pine. I told him what we had in mind, yes.

Q. Subsequent to that, did any negotiations take place between the partnership and Twin City Lumber Company? A. It did, yes.

Q. As a matter of fact, Mr. Elliff, you and Mr. Collins had a meeting with Mr. Hodes upon your return from this trip in 1952, is that not correct?

A. We did, at Mr. Hodes' home in San Mateo.

Q. What was the conversation generally about at that meeting?

A. Mr. Collins—he was very interested in what we were going to do down there in the way of selling pine lumber.

(Testimony of George F. Elliff.)

The Court: Mr. Collins was what?

The Witness: Was interested in what we were going to do in the way of selling pine lumber in LCL shipments, less than carload. He felt there was a definite need. He expressed that opinion. He was interested in selling us lumber and we discussed things on a long-time program.

Q. Was he interested at this meeting in Mr. Hodes' financial condition?

A. Yes, I would say he was.

Q. How was this interest expressed in conversation?

A. He asked about his financial position. [337]

Q. What was he told by Mr. Hodes?

A. Mr. Hodes, I remember telling him about the age of Abbot Lane Company, Inc., which he owned in Portland and brought to California, a sole ownership, and I told him the rating it carried in Dun and Bradstreet, which was substantial, and that was about the important factors of it, the highlights.

Q. Was there any discussion at this meeting at Mr. Hodes' house regarding your financial responsibility in this Hodes-Elliff partnership?

A. I think Hodes said he was going to supply the money and I was going to do the work. I think that is about what it amounted to.

Q. I believe you testified, Mr. Elliff, that Mr. Hunter and you were present at a meeting in San Francisco relative to Abbott Lane—I mean the Coast Range Lumber Company, is that correct?

(Testimony of George F. Elliff.)

A. We were.

Q. Who else was present at that meeting, where was it held, and about what time?

A. About nine o'clock in the morning in the lobby of the Fairmont Hotel, and Mr. Clements, Mr. Sullivan, Mr. Charles Lannin, Mr. Collins, John Hunter and myself.

The Court: When was this?

The Witness: This is in the Spring of 1951.

The Court: Aren't we going pretty far back, counsel, in talking about what happened in 1951?

Mr. Jacobs: Your Honor, the purpose of this is to show that the Twin City Company and Twin City Lumber Company were conversant for a long time back with the financial affairs of Mr. Elliff. I believe it is important in showing that knowledge in connection with the allegation of fraud. I am going to connect this now to the present time, to show how far it did go back and how long it continued.

The Court: That is long before the present Pine Supply Company was formed, wasn't it?

Mr. Jacobs: I will shorten as much as possible any questions relating to that far back and bring us up to the present time.

Q. At that time, at that meeting, was there a discussion of the financial affairs of the Coast Range Lumber Company? A. Yes.

Q. And was Mr. Hunter told what the financial affairs were? A. Yes.

Q. He was told what the financial condition of

(Testimony of George F. Elliff.)

the Coast Range Company was? A. Yes.

Q. What was it? What was the financial condition of the Coast Range Lumber Company?

A. Critical. [339]

Q. When you say critical what do you mean? In dollars and cents or what were the excess of liabilities over the assets of the Coast Range Lumber Company at that time?

A. It was all liabilities at that time.

Q. What was the extent of the liabilities?

A. \$120,000.00.

Q. Did you have occasion to have any conversations with Mr. Hunter at a later date than this regarding the liabilities of Coast Range Lumber Company and your proportion of those liabilities?

A. Yes.

Q. Did you have a conversation with Mr. Hunter in this regard in the early Spring of 1953? Or if not, when was the first conversation held after this——

A. 1952, I believe.

Q. Did you hold various conversations with Mr. Hunter in 1952 in this regard?

A. 1951 and 1952, yes.

Q. When did the affairs of the Coast Range Lumber Company wind up?

A. In the Spring of 1952.

Q. In the Spring of 1952? A. Yes.

Q. Did Mr. Hunter have any business dealings as Twin City Lumber Company or as Twin City Company with this corporation? [340]

A. They did.

(Testimony of George F. Elliff.)

Q. Did the corporation owe the Twin City Lumber Company or the Twin City Company any money?

A. Coast Range owed Twin City Lumber Company from October, 1951 until around April or May of 1952 in the neighborhood of \$20,000.00.

Q. Was this a secured indebtedness?

A. As far as Mr. Hunter was concerned it was secured by lumber, yes.

Q. Did you have occasion to be in the Long Beach area to sell some of this lumber of the Twin City Company, that the Twin City Company had sent to the corporation known as the Coast Range Lumber Company? A. Yes.

Q. When was this?

A. From October to April or May of the following year I was there almost once a week.

Q. What year was that? A. 1951 and 1952.

The Court: Was where once a week?

The Witness: In Los Angeles, in Mr. Hunter's office; I may state on an average of once a week.

Q. (By Mr. Jacobs): During this time did Mr. Hunter ever express any knowledge of your financial affairs, your private financial affairs? [341]

A. Did he express?

Q. Yes. Just answer it yes or no. A. Yes.

Q. Did he discuss with you any particular financial indebtedness which you had? A. I did.

Q. You did? A. I did.

Q. What did you tell him?

(Testimony of George F. Elliff.)

Mr. Shapro: When, where and who was present, please?

Q. (By Mr. Jacobs): When did these conversations take place, where, and who was present?

A. In the year 1952 sometime, early Spring, I would say, in the Spring of 1952.

Q. Where were the conversations held?

A. In Mr. Hunter's office on Beverly Drive, Beverly Hills, California.

Q. And who was present at those conversations?

A. The one I have the nearest recollection of, there was just Mr. Hunter and myself.

Q. And you said that you told him something of your financial affairs. What did you tell him?

A. I told him how broke I was over this Coast Range Lumber Company and what expense I had gone to to clean this up for him personally, which I hoped he appreciated. [342]

Q. Did you mention any figures?

A. Yes, I think I did.

Q. What were the figures you mentioned?

A. Around \$20,000.00 that I either had invested or owed.

Q. Did you tell him what you owed?

A. I remember stating the note that bothered me a great deal.

Q. What note is that that you have reference to?

A. The note of the Bank of America that Mrs. Lannin had secured.

Q. How much was that note?

A. \$5,000.00.

(Testimony of George F. Elliff.)

Q. Did you tell him anything about your obligation on the Coast Range indebtedness?

A. Yes, I did.

Q. Did you tell him how much that was at that time? A. Yes.

Q. What was it?

A. One-sixth of what was owed by the corporation.

Q. Can you break that into how much it was for you?

A. What is one-sixth of \$70,000.00? That is about what it was.

Mr. Shapro: \$11,333.00.

The Court: Was this a corporation, the Coast Range?

The Witness: Yes, but the indebtedness I was worried [343] about was secured by bank notes, not as a corporation, but as an individual.

Q. (By Mr. Jacobs): Did you have occasion to have a conversation with Mr. Hunter in May of 1953? A. Yes.

Q. Where was this conversation held, who was present, and if you can, please——

A. My memory is vague but I think I had one prior to the setting up of the warehouse, which took place on May 3rd.

Q. Where was this held?

The Court: That is 1953?

The Witness: 1953. I know there were numerous phone calls in April over this matter, but the one

(Testimony of George F. Elliff.)

that is definite in my mind is the Sunday that I spent at his home on May 3rd, 1953.

Q. (By Mr. Jacobs): Who was present?

A. Mrs. Hunter, Mr. Collins and Miss Brown, John Groves, John Hunter and myself.

Q. During this conversation were your financial affairs discussed? A. Yes.

Q. Did you tell them what your assets were?

A. I doubt it.

Q. Did you tell them what your liabilities were?

A. He already knew them. [344]

Q. Did you discuss them? A. Briefly.

Q. What did you tell him that they were?

A. Rather what he told me.

Q. What did he tell you they were?

A. He said he was basing this, doing business on Mr. Hodes' statement as Abbott Pine Supply.

Q. Did he tell you what your financial standing was as of that time as far as he was concerned?

A. I think he inquired if some of the pressure was off, was all, Mr. Jacobs.

Q. Did you not discuss any indebtedness that you had at that time?

A. I do remember telling him the bank note by that time I had reduced a thousand dollars.

Q. To a thousand dollars?

A. I had reduced it to \$4,000.00 from \$5,000.00.

Q. Did you tell him about any of the other obligations which you had, if you had any?

A. Not to my recollection.

Q. Did he tell you of any that he knew of?

(Testimony of George F. Elliff.)

A. No, he was basing the business on my ability to get out and sell and work, in which he had a lot of confidence. That was all.

Q. Subsequent to that conversation did you have any further [345] conversations with Mr. Hunter regarding your financial affairs?

A. From time to time it was mentioned over phone calls and meetings with him, yes.

Q. When was the first of these meetings after this May 3rd meeting?

A. It was rather a phone conversation with Mr. Hunter over the dissolution of the partnership between Hodes and myself.

Q. And when was that conversation held?

A. In and around May 28th some time.

Q. Where did you receive the call?

A. I phoned him.

Q. You phoned him? A. Yes.

Q. Where did you call him?

A. I called him in Los Angeles.

Q. What was the conversation substantially?

A. Well, he was very definite that he could not continue with myself as sole owner without any capital to work on, and I told him I was making every arrangement I possibly could to put something in the company so that it would not fold up completely. After all, I was stuck. I had to do something, and I did have a couple of things in mind that I outlined to him.

Q. Did he say why he could not continue to operate with you as the sole owner? [346]

(Testimony of George F. Elliff.)

A. There is no doubt but what he did, yes.

Q. Do you remember what he said?

A. He said, "George, you don't have anything."

Q. He said, "George, you don't have anything"?

A. Well, "From what you told me you don't have anything." Let us put it that way.

Q. He said that? A. Yes, he did.

Q. When was the next conversation you had with Mr. Hunter in regard to your financial affairs?

A. The pertinent one was when I borrowed \$7,000.00 to put into the business.. I called him and told him I had made arrangements to put \$7,000.00 in, which I thought would carry my percentage, which he was concerned about, of the thirty per cent that I had to pay upon receipt of the material into the warehouse.

Q. When was this conversation?

A. In June.

Q. Was this also a telephone conversation?

A. Yes.

Q. Did you tell him where you got the \$7,000.00?

A. I did.

Q. Where did you tell him that you had gotten it?

A. I told him I was able to borrow \$7,000.00 from my mother-in-law, Mrs. Pearl K. Lannin.

Q. Was there any other discussion in that particular telephone conversation regarding any other of the financial affairs of yours?

A. I don't believe so.

(Testimony of George F. Elliff.)

Q. Were there any other conversations after that one regarding your financial affairs?

A. Every time I became delinquent.

Q. How often would you become delinquent?

A. Well, I think the next time that it got serious was in the latter part of July or August. It seemed like monthly we were in a state of critical need of money?

Q. In your dealings with Twin City Company as Pine Supply Company what were the terms that you received shipments on?

Mr. Shapro: I will submit, if your Honor please, that the document is in evidence, the invoice, that is the best evidence of the terms. The terms on which they were made are specified in the warehouse agreement of May 4th, which is in evidence.

Q. (By Mr. Jacobs): I show you plaintiff's Exhibit 4 and call your attention to the note that says thirty per cent cash advance ten days after receipt——

A. Balance in accordance with warehouse agreement.

Q. Did you live up to the terms of this agreement?

A. When it was possible I did.

Q. Were your payments made according to this within the time called for? [348]

A. Seldom but frequently.

Q. I do not understand your answer.

A. When I had the money I lived up to the agreement.

(Testimony of George F. Elliff.)

Q. How often did you make the payments according to this that you have just read?

A. I couldn't answer that question without looking at the books.

Q. To the best of your recollection were you often behind in your payments?

A. More times behind than on time I would say, yes.

Q. How far behind were you?

Mr. Shapro: I submit, if your Honor please, the records are the best evidence. They show the dates they were due, they show the dates they were paid. In fact, that is the same objection that was made when I asked the same question by Mr. Huntington Jacobs this morning.

The Court: I think so, counsel.

Q. (By Mr. Jacobs): When Mr. Hunter would call you in regard to your delinquent payments, as you mentioned did you receive conversations in that regard, would he mention anything about your financial affairs? A. Yes.

Q. Can you place in time any of these telephone conversations? [349]

A. They were so numerous, Mr. Jacobs, to pinpoint one of them——

Q. Can you give us the general gist of what he would tell you in these telephone conversations regarding your financial condition?

A. Half the time he did not make sense, he was so mad that you could not understand much of what he was saying or trying to say.

(Testimony of George F. Elliff.)

Q. Did you get the general idea of what he was trying to say? A. Yes.

Q. What was that?

A. He was wanting money.

Q. These conversations all took place prior to October of 1953, is that correct?

A. Some of them after October, too.

Q. Those were in regard to the purchases you made after the October transaction, the ones that you referred to as after October?

A. Or requests, as I recall now. The request was made at one time for an extension of time on the note. That was a violent one, too.

Q. So he also called you in regard to the delinquent payment on the note?

A. No, just for the request of extension. [350]

Mr. Shapro: It was not delinquent.

Mr. Jacobs: I stand corrected. Excuse me.

Q. Around the time of this October transaction there were many conversations held by you, Mr. Hunter, Mr. Ramsey, Mr. Baum and Mr. Pasquinnelli, is that correct? A. Right.

Q. When did you first have a conversation with Mrs. Lannin in regard to the guarantee on the note?

A. Either the Saturday or Sunday morning, October 4th, I believe.

Q. Where did that conversation take place and who was there?

A. My wife, Mrs. Lannin and myself in Mrs. Lannin's home in San Jose.

(Testimony of George F. Elliff.)

Q. Did you ask Mrs. Lannin to sign as guarantor on the note? A. I did.

The Court: What?

The Witness: I did.

Q. (By Mr. Jacobs): Did you explain to her what the purpose of the guarantee was?

Mr. Shapro: I object to that, if your Honor please, on the ground it is hearsay and not binding upon the defendants. There is nobody representing the defendants and Mrs. Lannin's home at this interview.

The Court: I think that is correct, counsel.

Mr. Jacobs: I might call the attention of the Court that the evidence should be admitted as to the defendant Lannin because Mrs. Lannin is also a defendant in this case. Mr. Elliff is the witness of the plaintiff in this case.

Mr. Shapro: Your Honor, here we have the thing that I spoke about when this case started. Here we have the essence of what I chose to call a conspiracy. Here we have a defendant, Mrs. Lannin, named in this suit for only one purpose: to permit this gentleman to cross-examine her son-in-law. There is no relief sought as against Mrs. Lannin by the plaintiff in this case whatever. I challenge counsel to show there is any sort of relief called for or even possible as against Mrs. Lannin on behalf of the plaintiff. There is an allegation in the complaint, if your Honor please, that her rights to the security remaining in the warehouse

(Testimony of George F. Elliff.)

at the time of bankruptcy might be affected in this matter.

At the opening of this case counsel told your Honor that in the meantime that has been adjudicated adversely to Mrs. Lannin. Therefore, if your Honor please, the fiction of Mrs. Lannin being a defendant in this action is now apparent in light of the observation just made by counsel, and I object to the question upon the ground that your Honor has already sustained it.

Mr. Huntington Jacobs: I want to be heard if I may. Mrs. Lannin was not joined as a defendant in this action [352] pursuant to any conspiracy. I have said that before. The trustee joined Mrs. Lannin because she was a party to this transaction, apparently a necessary party to this suit.

The Court: A necessary party to the suit?

Mr. Jacobs: Yes, your Honor.

The Court: Why?

Mr. Jacobs: Because we were asking that this note be declared void and that a guarantee be declared void, and I believe it is the general rule that the parties to a transaction who are or are likely to be affected by the Court's determination, whether favorably or unfavorably, ought to be joined as parties to the suit.

It is perfectly true, as counsel says, that the matter in controversy at the time this case began between Mrs. Lannin and the trustee has been determined by a final order in the bankruptcy proceeding. That is perfectly true.

(Testimony of George F. Elliff.)

The facts, however, still do remain that Mrs. Lannin was a party to this note, I mean a party to this guarantee, and still is. I think she is still a proper party, although perhaps not now a necessary party. That is the only observation I have to make. I am not making that in response to counsel's objection, but I am taking exception to his continued allegation that there is any conspiracy here on the part of counsel for the cross-complainant, myself, because there is none and there never has been any. [353]

Mr. Shapro: If your Honor would care to hear further on the subject I would be glad to proceed further.

The Court: Is any relief asked against Mrs. Lannin at this time?

Mr. Shapro: No, there is not, except relief that would affect her substantial rights, of course.

The Court: What are her substantial right? Her right to pay the money?

Mr. Shapro: That is it, exactly, your Honor, her right to pay the money.

Mr. Huntington Jacobs: It would not adversely affect her rights, your Honor. I think her interest would be subserved as a matter of actual fact, but I do not think it proper for the plaintiff to determine whether the affect upon her substantial rights would be favorable or unfavorable.

It seems to me that if they are to be affected at all she should be a party.

However, I want to observe that the bankrupt,

(Testimony of George F. Elliff.)

it seems to me, is in a different position. His interests are naturally, by force of the Bankruptcy Act, his rights have been transferred by operation of law to the trustee, and I want to note that that is the reason why I did not join the bankrupt as a party defendant, because it would seem to me to be anomalous to recognize him as having any interest adverse to the trustee. [354]

I did not think that he did have any interest that could be affected by the outcome of this case, because if the Twin City owes any claim against him, it seems to me it is very clearly a claim which should be asserted in the bankruptcy proceeding.

The Court: Apparently all this arises by reason of what they are trying to develop happened in a conversation. I do not know what happened as yet but I am going to admit it at this time subject to a motion to strike it out in order to proceed with the matter. All you are asking for is the conversation between Mrs. Lannin and Mr. Elliff and his wife, is that right?

Mr. Jacobs: That is correct.

The Court: All right, go ahead, counsel. Let us not have any leading questions in this conversation, counsel. You can ask him what was said and let us get it that way.

Mr. Jacobs: All right.

Q. Mr. Elliff, can you tell the Court what was said by the various parties to this conversation on this date that you just mentioned?

(Testimony of George F. Elliff.)

Mr. Shapro: Subject to the same objection, your Honor.

The Court: Yes. It will be stipulated all of this is received subject to a motion to strike.

Mr. Shapro: Thank you, your Honor.

The Witness: I went to Mrs. Lannin and pleaded with [355] her, and that is exactly the way I feel about it and felt——

The Court: Mr. Elliff, if this is to be of any value to me I have to hear it.

The Witness: I am sorry.

The Court: I am doing my best to hear, to listen, but I miss every once in a while something you say and I want to hear it all.

Mr. Jacobs: If you will face the Court, Mr. Elliff.

The Court: The last I heard, you said you pleaded with her——

The Witness: I pleaded with her to come to my rescue and get me out from under this pressure that I was under constantly from Twin City, and the only way I knew how to continue in business was to get out from under, and the only way I could get out from under was to give them substantial security in a note or pay them off in cash, which they would only give me two alternatives to do, and the note was the simplest way because it involved no outlay of cash at that time.

She thought it over and said, "Yes." I don't know whether she said "Yes" at that particular time but she did say yes after due investigation.

(Testimony of George F. Elliff.)

Q. (By Mr. Jacobs): Was there any conversation at that time regarding the trust agreement?

Mr. Shapro: If your Honor please, we have some leading questions. [356]

The Court: Counsel, that is just what I do not want to get into is leading questions. This witness is capable. He understands. You were asked what was said in the conversation. Give what was said, and when you finish, stop and we will go on to something else.

Mr. Jacobs: I will withdraw the question.

The Court: I will permit you to ask him what else was said, counsel, and then have him tell us, and when he does, that stops it.

Q. (By Mr. Jacobs): What else was said at this conversation, Mr. Elliff?

A. I mentioned that we could work out something to protect her in the form of warehouse receipts which we already had, we could transfer over, in which she would have the same rights as Mr. Hunter had, and that was her security in a sense for signing the note.

Q. Was anything else said?

A. Not of importance to the Court, no.

Q. Did you have any other conversation with Mrs. Lannin in regard to this October transaction?

A. Yes.

Mr. Shapro: Before October?

Mr. Jacobs: Before October.

Q. Before the trust agreement and the note were signed. A. Yes. [357]

(Testimony of George F. Elliff.)

Q. When was that conversation held, where, and who was present?

A. On the morning of October 8th in Mr. Pasquinelli's office.

Q. Who was present?

A. Mr. Pasquinelli, Mrs. Lannin, Mr. Baum and myself.

Q. What was said by whom at that conversation?

A. The details were explained to Mrs. Lannin.

Q. What details were explained to Mrs. Lannin?

A. I am coming to that—of the trustee agreement that had been roughly sketched out the day before by Mr. Pasquinelli, Mr. Ramsay, Mr. Baum and myself.

Q. Had Mrs. Lannin taken any part in these details that you speak of?

A. No, sir, she was not present until the morning they were getting ready to type them up.

Q. But these details were gone over with Mrs. Lannin? A. Yes, they were.

Q. Was there any other conversation at this particular incident?

A. No, we broke up to give time to Mr. Pasquinelli to prepare because time was the essence. The warehouse was closed, and I was in a hurry to reopen it, and the only way I could get it reopened was to get the trustee agreement signed which the Twin City had requested, or Mr. Ramsay had [358] requested, and the signing of the note, and to expedite that, time was of the essence, and so we got

(Testimony of George F. Elliff.)

out of Mr. Pasquinelli's office so he could prepare it formally and had it prepared that evening for us, at which time she signed it.

Q. When was the next conversation you had with Mrs. Lannin in connection with this transaction?

A. That evening, on October 8th, when I went by to pick up the signed copy.

Q. You went by where? A. Her home.

Q. Who was there?

A. I believe Mr. Baum was there—I am not certain but I believe Mr. Baum was there. Whether he went in the house I am not sure. He might have stayed in the car.

Q. You, Mrs. Lannin and Mr. Baum?

A. I am not certain of Mr. Baum but Mrs. Lannin and myself.

Q. Was there any conversation held in regard— A. It was personal.

Q. It was personal? A. Yes.

Q. What did you testify was the reason why you had gone there?

A. Because of the demands of the Twin City Lumber Company to get this thing signed.

The Court: You went there to get the document signed, didn't you, in the evening? [359]

The Witness: Yes, sir, exactly.

Q. (By Mr. Jacobs): Had it been signed as of this time? A. I believe so, yes.

Q. What did you do with the document?

A. I signed a copy, I believe, at that time and

(Testimony of George F. Elliff.)

left it with her, and I had another copy unsigned that I took to San Rafael with me.

Q. That was just preceeding your trip to San Rafael?

A. I picked it up for that purpose so I could deliver it to Mr. Ramsay in San Rafael.

Q. What documents did you pick up from Mrs. Lannin?

A. There was that letter of transfer, one copy or two, I don't remember which, of the trust agreement, and the signed note. They had requested a financial statement, which I did not pick up until the following morning at the bank.

Q. Did you give to Mrs. Lannin at any time from May until the October transaction was completed a financial statement?

Mr. Shapro: I am going to object to that anew, if your Honor please, on the ground it is incompetent, irrelevant and immaterial as to what information, financial or otherwise, was given to this witness to his mother-in-law antedating the October agreement. It is completely incompetent, irrelevant and immaterial. This is not on the hearsay objection; this is on the basis of its materiality.

Mr. Jacobs: We haven't got an answer yet. [360]

Mr. Shapro: I am trying to see that you do not get it, if the Court rules with me.

The Court: This is your cross-complaint, isn't it, counsel?

Mr. Jacobs: That is correct.

Mr. Huntington Jacobs: The reason why we did

(Testimony of George F. Elliff.)

not object to it, your Honor, is simply in the interest of saving time.

Mr. Robert Jacobs: I could call this witness, your Honor, as Mrs. Lannin's witness, but since you ruled I cannot ask leading questions, I can get the same information out of him now perhaps and save the Court's time.

Mr. Shapro: Your Honor, whatever information he did or did not give his mother-in-law, without first having been tied up with us, is completely hearsay to us and not binding upon us. Our position, if your Honor please, is that no matter what he told Mrs. Lannin or what he did not tell Mrs. Lannin, unless we are shown to have authorized it or participated in it we cannot be tarred with that brush, if I may use that expression, and this is an important point in this case, regardless of whether it is on her cross-complaint or in connection with the cross-examination of the plaintiff's witness. The situation is still this. Mr. Elliff got his mother-in-law to endorse a note in favor of Twin City Lumber Company for an amount of money which was not one penny in excess of what he owed at the time. He testified three minutes ago the [361] purpose of the trust agreement was to secure her and give her the same warehouse receipts that the Twin City had, and that was exactly what she got. The estate of the bankrupt was not in any way depleted nor was it increased, nor were the liabilities increased or decreased by this entire transaction.

(Testimony of George F. Elliff.)

Nobody in the world could have been defrauded unless he misrepresented facts to his mother-in-law, in which case the action for fraud is by his mother-in-law against him.

Where in this picture, if your Honor please, Twin City Lumber Company has been shown thus far to have any possible connection with any fraud as against the bankrupt's estate, which is the gravamen of the complaint, or with any fraud, as far as the cross-complaint is concerned, is more than I can understand, your Honor, and that is why I think we have been spending all of this time in pursuance of a cause of action which can have no benefit to anybody except Mrs. Lannin, who has no right to the protection of this Court or the trustee in bankruptcy.

The Court: In the cross-complaint the named defendants therein are the Twin City Lumber Company in its various aspects.

Mr. Shapro: Yes, your Honor.

The Court: And no one else.

Mr. Shapro: That is right.

The Court: The bankrupt is not a cross-defendant. The trustee in bankruptcy is not a cross-defendant. And as to what [362] this witness told his mother-in-law, I cannot see how that can affect a cross-complaint against the Twin City Lumber Company.

Mr. Robert Jacobs: If it please the Court, there is an allegation in the complaint of fraud against

(Testimony of George F. Elliff.)

the Twin City Company. We believe the evidence has indicated and will further indicate and show that the acts of that constituted fraud were a part of a conspiracy in which Twin City was a party, a conspiracy to defraud not only the other creditors, or the creditors of the bankrupt, of whom Mrs. Lannin was at that time also, but to defraud Mrs. Lannin; the acts of Mr. Elliff and the statements of Mr. Elliff given to his mother-in-law were part of that fraud to which Twin City was a party, and therefore should be admitted against Twin City.

Mr. Shapro: If your Honor please, where has there been an iota of evidence of a conspiracy? The evidence is that Mr. Hunter was pounding on the desk and yelling over the telephone that he wanted his money. The money was justly due him. Where is there a conspiracy when Mr. Hunter says, "You can't have your warehouse receipts unless I can get a guarantee." Where does that tie in Twin City with any such fraud? It is beyond my comprehension.

The Court: I cannot see, counsel, where any statement that this witness is alleged to have made to Mrs. Lannin—I guess you are referring to the allegations in Paragraph 3 of your cross-complaint, which I have not read in detail, this [363] witness not being a defendant in the action—how that could affect your cross-complaint, counsel.

Mr. Robert Jacobs: As I just stated, your Honor, I believe there is evidence that shows that Twin City was a party to a conspiracy to defraud the

(Testimony of George F. Elliff.)

creditors of the bankrupt. It was shown by Mr. Pasquinelli's testimony——

Mr. Shapro: In the first place, if your Honor please, in this cross-complaint there is no relief for the bankrupt estate. Let us assume there was fraud to the bankrupt's estate for the sake of argument only.

This cross-complaint is for whose benefit, your Honor? Mrs. Lannin.

The Court: And against whom?

Mr. Shapro: Against the Twin City Lumber Company.

The Court: Yes, but you have to show some action of the Twin City Lumber Company, and I do not think you can show it by testimony of this witness's statements to his mother-in-law.

He has already testified as to what the conversation was when he went there. You asked him about that and he related it in full. I admitted it subject to a motion to strike in order to save time, but I do not see how what you are trying to do now can develop a cause of action against the Twin City Lumber Company. It might if you were bringing an action against this man here to set aside the note or some action against him here for damages, we will say, you might show that he had [364] fraudulently represented things to her or something of the kind, if that is the purpose, but at the moment I do not see how any fraudulent statement that he makes—let us assume for the moment they are fraudulent—can affect Twin City. Maybe I do

(Testimony of George F. Elliff.)

not get your point clearly, counsel, but that is the way it occurs to me.

Mr. Huntington Jacobs: May I make an observation, your Honor, which has to do to some extent with the trustee's case?

It does seem to me that there is evidence in the testimony of Mr. O'Connor and Mr. Pasquinelli, Mr. Baum and Mr. Elliff that this guarantee was procured by not merely Elliff on his own initiative but by Elliff on the initiative also of Twin City Company.

The same is true of the trust agreement, and if that is true, and there was a concert of design, then it seems to me that each of the parties who asserted that design is responsible for what any of them did in furtherance of that design, and that would include the representations that each of them made in furtherance of that design.

It may be counsel's question does not sufficiently show that it was in furtherance of the design but it does not seem to me that when an objection lies as showing what these parties who have asserted it did, whether in the presence of each other or individually to further their common design——

The Court: Counsel's statement is strangely familiar to [365] me in the law of conspiracy. Counsel has apparently had some experience in the criminal aspects of that, and it is true that whatever one conspirator says after a conspiracy has been formed is binding upon all of the others. It is also true that sometimes a declaration of a conspirator

(Testimony of George F. Elliff.)

is substantial proof of the existence of the conspiracy itself.

Mr. Huntington Jacobs: That is right.

The Court: For that purpose it is possible that this might go in, if it eventually tends to prove a conspiracy. It may never tend to prove a conspiracy but this is their contention that it does tend to prove such a conspiracy.

Mr. Shapro: I understand the purpose, your Honor. I do not think the question even tends to prove that, but that, of course, is for your Honor.

The Court: I understand that is the purpose. I will permit it on that basis.

(The last question was read by the reporter.)

A. To my knowledge she did not request one.

The Court: You did not give her one. The answer is no, then.

The Witness: No.

Q. (By Mr. Jacobs): Did any give her a financial statement at your direction?

A. We did some time in October give her——

Q. When you say "We"—— [366]

A. Mr. Baum gave her at my request a list of the accounts receivable, I believe, and the accounts payable.

Mr. Shapro: Before or after October 8th?

The Witness: I believe before. I believe before, because it seems we had to turn it over to Mr. Robidoux.

The Court: Mr. Robidoux?

The Witness: Yes, sir.

(Testimony of George F. Elliff.)

Q. (By Mr. Jacobs): Do you remember what that financial statement showed?

Mr. Shapro: I object to that, if your Honor please, on the ground that the document is the best evidence.

The Court: I think that is right.

Q. (By Mr. Jacobs): Was there a formal document presented do you know, Mr. Elliff?

A. No, I do not think it was formal.

Q. What kind of a financial statement was given?

Mr. Shapro: I make the same objection, if your Honor please. Whatever was given was given in writing. The writing is the best evidence of its contents.

The Court: Was it given in writing?

The Witness: Yes, it was given in writing.

The Court: Do you have a copy of it?

The Witness: No, sir, I do not.

The Court: Do you know where a copy is?

The Witness: I am sure that Mr. Robidoux would have one in his file. [367]

The Court: By whom was it prepared?

The Witness: Mr. Joe Baum.

Q. (By Mr. Jacobs): It was prepared by Mr. Joe Baum at your direction? A. Yes, sir.

Q. Was that the last conversation you had with Mrs. Lannin, the one in which you went over to her home and picked up the papers, the documents, regarding the October transaction prior to any demand for payment by Twin City Lumber Company

(Testimony of George F. Elliff.)

or by representatives of Twin City Lumber Company?

A. I believe I called her after Mr. Ramsay pulled this surprise on me about the trustee agreement and the trustee account, and I believe I telephoned. I don't believe I went back.

Q. Will you explain that statement?

A. Well, we went in to draw up the note and he insisted on this trustee account, which came as somewhat of a shock to me.

Q. When did this occur?

A. Prior to going to Mr. O'Connor's office.

Q. Who was present at this discussion?

A. It was discussed at Mr. O'Connor's office with Mr. Baum, Mr. Ramsay and myself.

Q. Was Mr. O'Connor present?

A. Yes. [368]

Q. And this was the occasion which it has previously been testified is the time when the note was prepared in a rough draft by Mr. O'Connor?

A. That is correct.

Q. I believe you testified there was some discussion of a trust agreement?

A. Mr. Ramsay, as I said, brought it up.

Q. Can you tell us what Mr. Ramsay said in that regard?

A. He said that we, meaning he as a representative of Twin City, were insistent upon a trustee account where they could be sure of getting their money.

Q. Did he say anything further?

(Testimony of George F. Elliff.)

A. Not until we drew it up.

Q. After it was drawn up was there a conversation held in that regard?

A. He had to approve it in San Rafael that particular night that we speak of so often.

Q. When you say he had to approve it what do you base that on?

A. I presume he was instructed. That is merely an opinion.

Mr. Shapro: I move to strike out his opinion.

The Court: It may go out.

Mr. Jacobs: Q. Did he make any statement to you in that regard?

A. He made a statement that I was to deliver it or to mail [369] it to him, which I thought by facilitating things it would be better if I did deliver it.

Q. When you say "it," to what do you refer?

A. I refer to the trustee agreement.

Q. Am I to understand your testimony that Mr. Ramsay told you that you were to submit the trust agreement to him? A. Yes.

Mr. Shapro: The word was "delivered", that the witness used.

The Witness: Yes, delivered.

The Court: Gave a copy of it to him.

The Witness: That is right.

Mr. Jacobs: Q. And that he was to approve it? Is that what you stated?

A. He wanted to read it—approve it, read it.

Q. There has been some evidence, Mr. Elliff, that

(Testimony of George F. Elliff.)

Mr. Pasquinelli discounted acting as trustee some time in March of 1954. A. Right.

Q. What was done with the funds that were in the trust account at the time of this dissolution?

Mr. Shapro: Your Honor, that has already been asked and answered.

The Court: Not by this counsel.

Mr. Shapro: That is true. [370]

The Witness: What was done with the funds? A check was written to Mrs. Pearl K. Lannin and in turn she endorsed the check over to the First National Bank, Willow Branch, I believe it is, San Jose, and a new trustee was named, which was Miss Juanita Barnhardt.

Mr. Jacobs: Q. How was the check delivered or sent from Mr. Pasquinelli to Mrs. Lannin?

A. If I am not mistaken, Mr. Baum was the gentleman who brought it to me.

Q. Mr. Baum brought it from whom? Do you have any personal knowledge as to from whom?

A. From Mr. Pasquinelli, I believe.

Q. What did you do with it?

A. I took Mrs. Barnhardt to the bank and we established a new account at the Willow branch of the First National Bank in San Jose.

Q. You testified, did you not, that this check was made out to Mrs. Lannin?

A. Mrs. Pearl K. Lannin.

Q. Was this check endorsed by Mrs. Lannin when it was delivered to you?

A. Yes, and I believe—yes.

(Testimony of George F. Elliff.)

Q. Were you the one who obtained the endorsement? A. I could have, Mr. Jacobs.

Q. You do not remember? [371]

A. No, no.

Q. Do you have any personal knowledge as to where the money that was put into this trust account came from? A. Yes.

Q. Where did it come from?

A. It came from collections of accounts receivable of Appliance Supply Company.

Q. After Mr. Pasquinelli resigned as trustee a new trustee was appointed and the trustee account continued, is that correct? A. Yes, it did.

Q. Where did the funds come from that went into the new trustee account?

A. From the same source, accounts receivable of Appliance Supply.

Q. Do you have any knowledge of any other funds that went into that trust account except the funds that came from accounts receivable?

A. I have no knowledge. I don't believe there were.

Mr. Jacobs: I think that is all.

Mr. Shapro: Your Honor, may I have the redirect on the cross-complaint first?

Redirect Examination

Mr. Shapro: Q. Mr. Elliff, when you say the proceeds of accounts receivable of Appliance Supply went into the trust [372] account of Mr. Pasquinelli and subsequently to his successor you mean,

(Testimony of George F. Elliff.)

do you not, the proceeds of sales of lumber evidenced by invoices and accounts receivable thereafter? A. That is right.

Q. Mr. Elliff, you have just testified a few moments ago that Mr. Ramsay pulled a surprise on you in demanding the trustee agreement. Isn't it a fact that three minutes before in this very Court you testified that you suggested that as a means of protection to Mrs. Lannin? A. I did not.

Mr. Shapro: I will stand on the record on that.

Q. May I read to you, Mr. Elliff, from the trust agreement which is in evidence——

A. Could I straighten you out before? Because I said the warehouse receipts would be her protection, not the trustee agreement.

Q. What is in the trustee agreement except the proceeds of sale of lumber from the warehouse besides warehouse receipts.

A. May I have that question again?

Mr. Jacobs: That is objected to. The document itself is the best evidence.

Mr. Shapro: I will withdraw the question.

Q. Are you familiar with this recital in the so-called trustee agreement:

“Whereas Pearl K. Lannin, also know as [373] Mrs. John Lannin, has signed a promissory note as a guarantor, and it is the desire of all parties to this agreement that this trust agreement be carried out primarily for the purpose of protecting said Pearl K. Lannin and to hold her harmless or indemnify her as guarantor in said promissory note.”

(Testimony of George F. Elliff.)

Were you familiar with that when you made your testimony today?

A. I had read it but it has been some time.

Mr. Shapro: I have no further redirect on this subject.

Mr. Huntington Jacobs: I have some recross. I have one question on redirect.

Recross Examination

Mr. Huntington Jacobs: I do not recall whether you made it clear how much in money or monies worth, I should say, of your stock in trade you bought from other suppliers than Twin City following October, 1953.

The Court: He said he bought two-thirds of it from other suppliers.

Mr. Jacobs: That was my recollection, your Honor, but I wanted to get it in dollars and cents if the witness can give it to us.

The Witness: In dollars and cents?

Mr. Jacobs: Q. Yes. [374]

A. How much total did I buy from other sources besides Twin City from October to June or July?

Q. As near as you can.

A. \$40,000.00 or better, it covered, I think.

The Court: That is the total amount.

The Witness: I would think so, yes.

The Court: Two-thirds of which you bought from suppliers other than Twin City, is that correct or not?

The Witness: I think my testimony this morn-

(Testimony of George F. Elliff.)

ing was two-thirds of the inventory left in the warehouse at the time of bankruptcy were from sources other than Twin City.

Mr. Shapro: No, that was not your testimony.

Mr. Huntington Jacobs: No, I agree. I will clarify this thing if I may.

Q. You testified that you did make some purchases in November, 1953, from Twin City?

A. \$4,000.00—almost \$5,000.00, yes.

Q. Does that \$40,000.00 that you just mentioned include the \$5,000.00 or not?

A. No, I don't think it would.

Q. You think it would not?

A. Not what I have in mind, no.

Q. What do you have in mind specifically?

A. I am thinking of purchases from Durable Plywood, Harbor Plywood, the Whittaker Company, Getts Brothers Company, and I [375] think that aggregate would easily come to \$40,000.00.

Q. How much of that \$40,000.00 purchased from other creditors than Twin City subsequent to October has been paid? A. That is a tough one.

Q. Approximate it if you can.

Mr. Shapro: For your purposes, Mr. Jacobs, I do not think the amount is important; I will be glad to stipulate that some portion of that remains unpaid.

Mr. Huntington Jacobs: I would like to show that all but a comparatively small fraction of it remains unpaid.

(Testimony of George F. Elliff.)

The Witness: I would say \$8,000.00 might have been paid off, roughly \$8,000.00.

The Court: \$8,000.00 out of \$40,000.00?

The Witness: I think so. It comes to mind because of the forms we filled out in the bankruptcy. I think there was \$32,000.00 owing.

Mr. Jacobs: Q. Left owing?

A. I believe so.

Q. When you filed your schedules. I think that is all.

Mr. Shapro: May I ask one question?

The Court: The answer is yes as to one question.

Mr. Shapro: Q. Mr. Elliff, to your knowledge was Twin City Lumber Company notified of the resignation of Mr. Pasquinelli and the substitution of someone else as trustee under the trust agreement? [376]

A. I don't know where you think of all these questions. I best can answer you to say why Mr. Pasquinelli quit.

Q. I am not interested in that.

A. That would answer your question, but that is the only way.

Q. I don't see how it could answer. If you think it would I am willing to listen to it if the Court is.

The Court: Go ahead.

The Witness: He asked to be relieved of the position because of the pressure by Twin City on the thing, and I had no other choice but to find some other way to take it over.

(Testimony of George F. Elliff.)

Mr. Shapro: That is not the question at all. I want to know, so far as you know, if anybody notified Twin City Lumber Company of the fact that Mr. Pasquinelli had resigned and someone else had been substituted. A. Not to my knowledge.

Mr. Shapro: That is all.

Mr. Huntington Jacobs: That is it. With the permission of the Court and counsel I will excuse the witness.

Mr. Shapro: That is satisfactory.

JUANITA H. BARNHARDT

a witness called by the plaintiff, sworn.

The Court: State your name and occupation for the record.

The Witness: Juanita H. Barnhardt. [377]

Direct Examination

Mr. Huntington Jacobs: Q. Where do you live, Mrs. Barnhardt?

A. At 566 Patton Avenue, San Jose.

Q. Are you employed? A. Yes, I am.

Q. What is your business or occupation?

A. I am bookkeeper for the San Jose Lumber Company.

Q. Were you employed by Mr. George Elliff during the period from May of 1953 to June of 1954?

A. Let's see. Get the dates straight. I did part time work for Mr. Elliff at the Pine Supply Company, through, I would say, June, July, August, September and October of 1953. I did his billing,

(Testimony of Juanita H. Barnhardt.)

his invoicing. I was in the office next door and I did part time work there.

Then in November of 1953 I was appointed by the Douglass Guardian Warehouse Company as custodian, so I no longer was under Mr. Elliff's payroll but under the Douglass Guardian.

Q. Did you not thereafter keep books for Mr. Elliff?

A. I helped—I kept up and did all his billing and I helped Mr. Baum; he was doing a lot of research work back in the old partnership days, and I did a lot of work with Mr. Baum on the books, also for Pine Supply.

Q. And you kept the current accounts, didn't you, of the business subsequent to becoming the custodian? [378]

A. No. Mr. Baum kept books. I helped him.

Q. During the year 1954 who kept the books of the company?

A. Mr. Baum set up the books as of January 1st, the way I remember.

Q. January 1st of what year, Mrs. Barnhardt?

A. 1954, and he completed the tax returns for 1953. He was working there through the month of January and February and I would say half of March, up to the time of filing, and I kept the entries up and anything that came up, of course, I asked him how he wanted it done.

Q. He being Mr. Elliff, I suppose, or Mr. Baum?

A. Mr. Baum.

Q. Did you act in any other capacity for Mr.

(Testimony of Juanita H. Barnhardt.)

Elliff besides bookkeeper, as you indicated, and besides acting as a custodian?

A. I was also the trustee for Mrs. Lannin.

The Court: I would suggest, Mr. Jacobs, that you use leading questions until you get to some controversial question.

Mr. Jacobs: Thank you, your Honor. She is not a hostile witness as far as I know.

Q. In other words, you throughout the period that you have mentioned, beginning in June, 1953, I take it, and ending in June of 1954, you acted as a sort of general manager and bookkeeper of the business of Mr. Elliff, the Pine Supply [379] company, is that substantially correct?

A. Yes, sir. I think that the last date that I had anything to do with, was in the middle of July when I gave up the trustee account.

Q. When did you become trustee of this trust account you referred to?

A. I believe it was March 24th, 1954.

Q. Did you see the trustee agreement under which you acted as trustee? Would you recognize it if you saw it?

The Court: Counsel, what are trying to say? Lead the witness on any matter of this kind.

Mr. Jacobs: Very well. I can shorten it greatly that way.

Q. You succeeded Mr. Pasquinelli, did you not?

A. That is right.

Q. As successor trustee where did the funds that you handled go to, do you know?

(Testimony of Juanita H. Barnhardt.)

A. Well, some would be received directly by me through the mail. It would come in and I would give them to Mr. Elliff.

The Court: That would be from customers?

The Witness: From customers. Some he would collect and bring in and turn over to me and I would make the deposits to the First National Bank in Willow Glen and see that they were taken care of.

Q. You heard Mr. Elliff's testimony as to [380] how this trust was started, did you?

A. Yes, he and I started the account.

Q. Does his testimony agree with your recollection as to how that commenced? A. Yes.

Q. That is your own account? A. Yes, sir.

Q. You made disbursements on this account from time to time, did you not? A. Yes, I did.

Q. From the funds that you have referred to?

A. Yes, sir.

Q. I show you Plaintiff's Exhibit 4, Mrs. Barnhardt, which is a photostat of the Twin City account of monies received from Mr. Elliff during the period of your trusteeship as well as previously.

A. Yes, this is the open account.

Q. Yes, received on the open account during the period of your trusteeship.

Mr. Shapro: There are only three items there during that period.

Q. (By Mr. Jacobs): did you issue the three checks—I mean the checks for the amounts I am pointing to, \$3,170.00?

A. These are the invoices.

(Testimony of Juanita H. Barnhardt.)

Q. Oh, those are the charges? [381]

A. March 29th.

Q. No, here are the credits over here.

A. March 29th—this one February 3rd.

The Court: Haven't they all been testified to?

Mr. Jacobs: Yes, by other witnesses.

The Court: I have a record of them.

The Witness: Yes, I would have issued those checks.

Q. (By Mr. Jacobs): The \$1,200.00 one is the one you say you did not issue? A. No.

Q. Do you know where that came from?

A. I believe that was a check paid by Mr. Elliff.

Q. As his bookkeeper would you know that?

A. That is my recollection.

Q. You also made payments, did you not, on account of this promissory note?

A. Yes, I did, but I turned over all my records last Summer to the Bankruptcy Court and I can't go from memory on what amount was paid and when.

Q. No, I am not asking you to.

Mr. Shapro: I will stipulate, if your Honor please, that any payments that were made on the note as shown by the Exhibit here during the period of that trusteeship were paid by her from that account.

Mr. Huntington Jacobs: The Exhibit to which [382] counsel refers being, if I remember correctly, Plaintiff's 10 or thereabouts.

The Court: It would not be 10.

(Testimony of Juanita H. Barnhardt.)

Mr. Jacobs: That is it. Counsel's stipulation is, as I understand it, that the payments as shown by plaintiff's Exhibit 14, the payments by the bankrupt through the trustee or otherwise on account of the promissory note as shown by this Exhibit 14 are correct.

Mr. Shapro: I stipulated to that a long time ago, two days ago. I am stipulating now that the payments which according to Exhibit 14 were made during the period that the witness acted as trustee were made by her as trustee.

Mr. Jacobs: That is all.

Mr. Shapro: No questions.

PEARL K. LANNIN

called on behalf of the plaintiff, sworn.

The Court: Will you state your name and address for the record?

The Witness: Pearl K. Lannin, 1394 Sierra Avenue, San Jose.

Direct Examination

Q. (By Mr. Jacobs): Mrs. Lannin, you are one of the defendants in this action by the trustee and you are also the cross-complainant in this case? You are the Mrs. Lannin who is named as one of the defendants in this case? [383] A. Yes.

Q. You have heard the testimony of your son-in-law, Mr. Elliff, regarding the way in which you happened to endorse this promissory note which is in evidence? A. Yes.

(Testimony of Pearl K. Lannin.)

Q. Does your recollection accord with his testimony?

Mr. Shapro: If your Honor please, I am sorry. In this case I have to object.

Mr. Jacobs: Very well. I will be guided by counsel's objection. I wanted to save time.

Q. You did, did you not, have a transaction in October of 1953 in the course of which you executed certain documents? A. Yes.

Q. I will show you this installment note for \$28,000.00 which is marked Defendant's Exhibit B. It purports to bear your signature to a clause guaranteeing payment of it. Is that your signature?

A. That is right.

Q. I show you also a document entitled "Trust Agreement" and dated October 8th, 1953, and which purports to bear your signature as beneficiary of the trust as described in that document.

A. That is my signature.

Q. That is also your signature. Mrs. Lannin, how did you happen to execute this guarantee?

A. You mean the note?

Q. Yes. Who asked you to do it?

A. My son-in-law and daughter came over to the house and he said he brought the daughter along——

Mr. Shapro: If your Honor please, for the purpose of the record, if the witness is going to testify as to a conversation between her son-in-law and daughter, in the absence of any representative of the Twin City Lumber Company, what we want is

(Testimony of Pearl K. Lannin.)

to interpose an objection on the ground it is hearsay and not binding upon the defendant.

The Court: It may be admitted subject to the same motions made before.

Mr. Shapro: Thank you.

The Witness: They came over and he said that the reason he brought my daughter with him was that she was interested in it, too, being his wife, and then he told me that he needed some money to keep going in the business.

At the time I didn't understand it was closed up by the lumber company.

Mr. Shapro: If your Honor please, what the lady understood is not what the question calls for.

The Court: Just say what was said, Mrs. Lannin, as well as you can, what you said, your son-in-law and daughter in the conversation.

The Witness: Anyhow he stated he wanted this amount, [385] to make it as short as I can, and of course——

The Court: I am not asking you to make it short. Don't get that impression. I want you to say what was said, but just what was said, please.

The Witness: Well, of course, I was stunned to be asked for this much money, but at the same time, as I understood, just by observing that he had this large building out there and a lot of material there, not having any idea it would come to this point, we would ever be at Court with it, I did it out of the good of my heart, thinking that perhaps that was his one big chance, and my

(Testimony of Pearl K. Lannin.)

thoughts were that if I didn't, I might always be blamed that I didn't give him his chance and I said—I didn't say at that time that I would do it, but then a little bit later he came back or telephoned—I can't remember just how that I finally said I would do it, I would go along with it. I think that is the gist of everything.

Q. (By Mr. Jacobs): What investigation, if any, did you make into his affairs before you said yes?

A. Well, of course, observing the building and all out there, I assumed they were going along pretty nicely, and then he told me they were wanting to draw up a trust agreement——

The Court: They wanted what?

The Witness: To draw up a trust agreement—
[386] and I said I wanted to—he wanted to know if I would come up to Mr. Pasquinelli's office to go over that. I went up and Mr. Baum was there, whom I had never met before, and we went into Mr. Pasquinelli's office and they kind of told what they were doing, that twenty per cent of it—just before this—there is one thing I forgot——

Q. (By Mr. Jacobs): Just a minute. Won't you complete that sentence you started?

A. Twenty per cent of the collectible money or the money that was collected would be put in a fund to guarantee the payments to the Pine Supply Company.

Q. You mean Pine Supply Company?

A. No, I mean Twin City Company. Pardon

(Testimony of Pearl K. Lannin.)

me. And the trust agreement had not been drawn up at that time but they were talking what would be done in this office. So then I guess they drew it up a very short time because I said I wanted to take it to my attorneys to have them look over the trust agreement, which I did.

Q. You mean you took the trust agreement to your attorney?

A. Yes, when it was given to me.

Q. And your attorney was who?

A. Mr. Robidoux.

Q. What did you ask Mr. Robidoux to do?

A. Well, to go over the document and even to call on Mr. Pasquinelli or anything to see if it was all right for me to [387] sign this note and this trustee agreement.

Q. You mean to see if Mr. Robidoux thought it was all right? A. Yes.

Q. In other words, you asked for his advice on whether to go through with this transaction or not?

A. That is right.

Q. Did he advise you about it?

A. Well, he gave me some advice.

Mr. Shapro: If your Honor please, if it is advice the witness is going to testify to, a conversation between herself and her own attorney, I object to it as self-serving.

Mr. Jacobs: No, I have not asked her.

Mr. Shapro: But she is about to testify to it. You asked her if he advised her.

Mr. Jacobs: That is all I am going to ask.

(Testimony of Pearl K. Lannin.)

Q. Then what happened after he advised you?

A. It ended up that I decided to sign the note, but previous to this—I don't know whether it is out of order or not—that he had told me about the use—when other sales were made—the Douglass Guardian Warehouse receipts.

The Court: The warehouse receipts?

The Witness: They were to be more or less a protection, and I told Mr. Robidoux about those. And so he did a little bit of investigating and it ended up that I signed the note and the trustee.

Q. (By Mr. Jacobs): Did you sign them both at the same time?

A. That I am not sure of. I know I signed the note up in Mr. Robidoux's office.

Q. In Mr. Robidoux's office? A. Yes.

Q. Was the trust agreement there at the same time?

A. Well, I know I took one up for him to look at, so I must have signed it up there. To be absolutely frank I can't recall just where I signed the trust agreement.

Q. Can you give us your best recollection as to whether you signed it in Mr. Robidoux's office or in your own house?

A. I think it must have been at home because I remember definitely the note being signed in Mr. Robidoux's office.

Q. Where was the note at the time when you signed the trust agreement? Did you have it?

A. I think I left it with Mr. Robidoux.

(Testimony of Pearl K. Lannin.)

Q. Did you read over the trust agreement? I assume you did, having signed it, is that right?

A. Yes.

Q. That is, you read it over before you signed it and then what did you do with it after you had signed it?

A. I know that Mr. Elliff—well, I kept a copy.

Q. You had one copy?

A. Yes, I kept one copy of it. [389]

Q. Did you have more than one copy? You signed more than one copy of it, did you not?

A. Yes, and I think Mr.—I guess Mr. Elliff must have taken it. I didn't keep it.

Q. Isn't it a fact that there were three copies of that document signed? Do you remember?

A. There may have been.

Q. What happened to the other two after you signed them?

A. Mr. Elliff must have taken them because I kept only one copy.

Q. Both of them. That is what I wanted to bring out. Do you recall the date on which you signed this note and the trust agreement or dates on which you signed them?

A. It was the first week in October. One of them is dated the 6th and one the 8th, but I didn't even notice. Maybe down where we signed them was the date we signed them. I don't recall. I can't recall the exact date, no.

Q. Are you able to tell us with certainty whether Mr. Elliff obtained the note, the signed note from

(Testimony of Pearl K. Lannin.)

you or did not obtain the signed note from you at the time when he obtained these two copies, these two signed copies of the trust agreement?

Mr. Shapro: If your Honor please, I object to the question on the ground it is incompetent. Secondly, it assumes a fact not in evidence. The witness has already [390] testified she left the note with Mr. Robidoux.

Mr. Jacobs: No.

Mr. Shapro: That is what she said.

The Witness: Yes, I am quite sure I did. Now, I wouldn't be positive whether I left it with him there or not, but I know eventually I turned it over to him. I don't know if this is out of order or not. This is a new experience for me. I am trying to rack my brain as to whether I kept them and turned it over when these bankruptcy proceedings started or not, but eventually I turned it over to Mr. Robidoux.

Q. Eventually you turned it over to Mr. Robidoux. Have you told us all of the investigation that you made into Mr. Elliff's affairs or into Pine Supply Company affairs before you signed these documents.

A. I didn't get the very first of your question.

Q. Have you told us the entire investigation that you made or caused to be made before you signed these documents, the note, that is to say, and the trust agreement?

A. Well, I didn't make much investigation because I knew some of the affairs and I thought

(Testimony of Pearl K. Lannin.)

from the outlook of what I had seen at the company that things were going along very nicely until he needed more money, and this was going to provide him with enough to keep going.

Q. Was Mr. Elliff indebted to you at this time?

A. Yes. [391]

Q. In what amount altogether?

A. That was in October, 1953.

Q. This was in October, 1953, the early part of it.

A. I have a note here that might be—I don't recall offhand. A little over \$13,000.00.

Q. A little over \$13,000.00?

A. That is right.

Q. How long had he been in your debt?

A. Since about 1947.

Q. Continuously?

A. Off and on. At one time it was down to where it was only a few thousand dollars.

Q. Are you telling us that he had been owing you money continuously, some money continuously from 1947 up to this date? A. Yes.

Q. How long had he been your son-in-law?

A. I think they were married in 1947, 1946 or 1947.

Mr. Jacobs: Take the witness.

Cross Examination

Q. (By Mr. Shapro): Mrs. Lannin, did you ever meet Mr. Ramsay? A. No, not until——

Q. Not until this Court hearing?

(Testimony of Pearl K. Lannin.)

A. That is right. [392]

Q. You first met Mr. Hunter sometime in August, 1954, is that right? A. That is right.

Q. After a visit from Mr. Hunter to your home you paid in two installments a thousand dollars each on account of this \$28,000.00 note, did you not?

A. That is right.

Q. Did you ever meet Mr. Collins? A. No.

Q. Of the Twin City Lumber Company?

A. No.

Mr. Shapro: No further questions.

Mr. Robert Jacobs: One question, Mrs. Lannin.

Redirect Examination

Q. (By Mr. Robert Jacobs): Mrs. Lannin, was a demand ever made upon you by anyone for the payment of any sum in connection with the note that we have been discussing in this case?

A. Yes, by Mr. Hunter.

Q. When was that demand made?

A. It must have been August. He phoned me sometime. In August he came to my home and I think he phoned me after that once.

Q. Did you ever receive any communications by mail in regard to collections, a demand in this case for the note?

A. I don't believe I ever—if I did, I turned it over to [393] Mr. Robidoux, but I can't recall a letter. I recall of a telephone and at my home.

Q. Merely to refresh your memory, Mrs. Lannin, I will show you a letter, a copy of a letter

(Testimony of Pearl K. Lannin.)

which purported to be on Twin City Lumber Company stationery, and in which there is a reference to a demand for payment of \$19,506.20, and ask you if you ever received the original of that letter.

A. I don't recall ever seeing this.

Q. You do not recall ever seeing this?

A. There is something I can add.

The Court: Let us go on with this. Finish that subject. Is there any question about it?

Mr. Shapro: There is no question but that the original of which that letter is a copy was sent by Twin City Lumber Company at our request. It was dictated by my Associate, Mr. Aronson. Do you want the date? Because that is undated. We can give you the date.

Mr. Aronson: A date subsequent to October 21st, 1954.

Mr. Shapro: After October 21st, 1954.

Mr. Robert Jacobs: With the permission of counsel I offer this in evidence.

Mr. Shapro: No objection.

The Court: It may be marked Exhibit 16.

Mr. Robert Jacobs: I think it would be more properly marked as cross-complainant's Exhibit 1.

Mr. Shapro: Lannin Exhibit.

The Court: All right, Lannin Exhibit 1.

Mr. Huntington Jacobs: L-1.

The Court: Lannin Exhibit 1.

(The document referred to was thereupon received in evidence and marked "Lannin Exhibit 1.")

(Testimony of Pearl K. Lannin.)

The Court: Are you introducing it?

Mr. Robert Jacobs: Yes.

The Court: You want to do anything further about it with this witness?

Mr. Robert Jacobs: No.

Mr. Huntington Jacobs: Wait a minute. Do you want to get at the fact that she paid these two?

Q. (By Mr. Robert Jacobs): Were there any sums paid by you on this obligation, Mrs. Lannin?

A. Yes, there were two.

The Court: She has already testified to those.

Mr. Shapro: Two one thousand dollar payments.

Mr. Jacobs: Two one thousand dollar payments.

The Court: Made after August.

Mr. Shapro: 1954.

Mr. Robert Jacobs: They are evident on Plaintiff's Exhibit 14, your Honor. That is all.

Mr. Shapro: No further questions.

Mr. Huntington Jacobs: We are making better [395] progress than I had anticipated, your Honor, when I told your Honor that we were going to occupy the entire afternoon. There remains of our case the testimony of one witness that I would like to call at our next session, whatever your Honor decides, and the testimony of Mr. Baum, who has already been told, in accordance with your Honor's instructions, that he was to return and bring those documents to complete his cross examination.

The Court: To identify the book.

Mr. Shapro: I want him back for cross but not for the documents.

The Court: You will so inform him.

Mr. Huntington Jacobs: Yes, I will so inform him immediately at the conclusion of this session or at the earliest recess. We haven't in Court at the present time anything further with which to proceed.

Mr. Shapro: Pardon the interruption, but so there may be no misunderstanding—I am not attempting to be facetious—apparently Mr. Baum inadvertently took one of the Exhibits with him. He may have done it unintentionally, but I want to be sure he is instructed to bring back that letter that he took with him.

Mr. Huntington Jacobs: I have already assured counsel I will make that my personal concern. I think it is our Exhibit C, your Honor. [396]

The Court: For Identification.

Mr. Jacobs: Yes.

The Court: We will adjourn until Monday next.

(Thereupon an adjournment was taken until 10:00 o'clock a.m. of Monday, November 28, 1955.) [397]

Monday, November 28, 1955

10:00 A.M.

JOSEPH N. BAUM

recalled, previously sworn.

Redirect Examination

Q. (By Mr. Shapro): Mr. Baum, I think just

(Testimony of Joseph N. Baum.)

shortly before we closed the last session at which you testified, in response to one of my questions, you looked through the book which has been marked Defendant's Exhibit C for identification, I think. It might have been the other one, but we'll get to it.

In other words, what you testified to, if I recall your testimony correctly, was that during the months of October, November, and December of 1953, Mr. Elliff withdrew approximately \$1900.00, a total of approximately \$1900.00 for himself, is that right? A. Well, I can check the books.

Q. Do you want to check it again, please?

A. That is correct.

Q. That is approximately right? A. Yes.

Q. Now, Mr. Baum, earlier in your testimony in response to one of the Court's questions, you testified, if I remember correctly, that during the period of the trusteeship of Mr. Pasquinelli, namely, from October, let's say, 6th, 1953, to March 24, 1954, whereas Mr. Elliff was under the trust [399] agreement entitled to draw \$400.00 per month; that he had withdrawn, according to your testimony, as I recall it, a total of only \$1400.00. Will you check that, please?

A. That is correct, Mr. Shapro. I remember.

Q. That is correct?

The Court: That is from October '53——

Mr. Shapro: To March, 1954.

Q. How do you reconcile the two that he withdrew in the last three months of 1953, whereas he

(Testimony of Joseph N. Baum.)

drew only \$1400.00, almost, in the six month period involved?

A. Mr. Shapro, I would have to check some of the entries in the books, because I remembered the information I gave you. But the \$1900.00 was picked just out of—the debits in his drawing account, without offsetting any possible entries that might have corrected it.

Q. Well, now, what we want, Mr. Baum, and I am sure the Court wants it, and I know I want it, is the facts from the records as to how much money Mr. Elliff withdrew from the business during the period of October 8, 1953, to March 24, 1954.

A. All right. Now, if I—can I explain that answer that I gave, Mr. Shapro, because I found part of it?

Q. Yes, sure.

A. Prior to the time that the trustee bank account was set up—in other words, when I testified to the fact, they [400] had Mr. Pasquinelli's records as trustee, I testified that there was approximately \$1400.00 that Mr. Elliff withdrew from the period of time that Mr. Pasquinelli was administering the trust funds under the trust agreements.

Now, I find here that there were prior to that—in other words, from a bank account which was closed out, approximately about the time that the trust agreement went into effect, Mr. Elliff had drawn over the period of approximately two weeks or so, some \$360.48, which had nothing to do with the administration of the trust funds.

(Testimony of Joseph N. Baum.)

Then there is another entry something like that which would explain the difference.

Q. Then is it your testimony, Mr. Baum, that during the period from October 8, 1953, and up to March 24, 1954, that from all sources connected with the business—by all sources, I mean either from the trust funds administered by Mr. Pasquinelli, or from the business' own funds, that the total amount of withdrawals of Mr. Elliff was approximately \$1900.00?

A. Can I check another entry, Mr. Shapro?

Q. Surely.

A. No. After checking these journal entries, my answer would have to be amended or corrected, Mr. Shapro.

Q. Will you give us the correct figures?

A. The correct figure would be the 14—or approximately [401] \$1750.00. That resolves itself into the \$1400.00, or approximately \$1400.00, which I testified that he drew or that Mr. Pasquinelli paid him out of the funds which he administered, you know, as trustee.

And as I said, that other three hundred and some odd dollars which he had drawn out prior to the time that that trustee bank account was established, because there is a correcting entry in here for \$200.00.

Q. Then the other day when I was asking you to explain, if you could, the difference or the discrepancy between the December 31st, 1953, balance sheet, as to assets and liabilities, as compared with

(Testimony of Joseph N. Baum.)

your statement as to the business assets and liabilities of Elliff in October of '53, and you told me that one reason was—one of the reasons for the discrepancy would be Mr. Elliff's withdrawals.

In response to a subsequent question by me, you said his withdrawals for that three months period was \$1900.00.

Now, which was correct, what you say is \$1700.00? A. Approximately \$1700.00.

The Court: Was it \$1,760.00 you gave me, \$1400.00 plus 360?

A. Well, if I can check further on my——

Mr. Shapro, did I hand over as an exhibit that accounting that I had made for Mr. Pasquinelli as trustee?

Mr. Shapro: No, sir. [402]

The Witness: I didn't?

Mr. Shapro: No, sir.

Q. Perhaps it will save a little time, maybe, if I get at it this way:

Is this your testimony, that after January 1st, 1954, Mr. Elliff drew no money for himself from this business?

A. Well, I will have to check the records, Mr. Shapro.

Q. Don't those records——

A. Oh, plus the one other, the trustee accounting by me.

Q. Will you check those, please?

Mr. Baum, Mr. Jacobs has suggested that you

(Testimony of Joseph N. Baum.)

look at this photostat of the Pasquinelli accounting. Perhaps that will——

A. That is right. Those were photostated from my work sheets.

After January 1st, 1954, Mr. Elliff drew the sum of \$300.00.

Q. Up to March 24th?

A. That's right, between January 1st and of the time that Mr. Pasquinelli closed his account out. In other words, Mr. Pasquinelli gave Mr. Elliff sums of money during the time that he administered the trust agreement amounting to \$1123.55. Mr. Elliff, in addition to that, drew the sum out of the business of other funds, which I said were not under the control of the trustee in the amount of \$360.48.

Q. That is after January 1st?

A. No. This was in 1953. It would be after the date of— [403] well, actually it's from the beginning of October to the time Mr. Pasquinelli started drawing the checks on the account, which was somewhere around the 13th or the 15th of October.

So that would make it roughly \$1423.55. \$1123.55 plus \$360.00 is roughly \$1490.00, and then \$300.00 more between——

Q. January 1st?

A. That's right, between January 1st and March of '54.

Mr. Shapro: No further questions.

The Court: Well, the total is—we have got a lot of figures and they are contradictory of each other. I would like to know what the definite answer is.

(Testimony of Joseph N. Baum.)

From the time of the trust agreement to March 24th, what is the figure that he drew?

A. \$1784.13.

Q. (By Mr. Shapro): One more question, then, Mr. Baum. How much did Mr. Elliff draw personally from the business after March 24th and up to the time of its closing in 1954?

A. Do you mind if I do a little adding and subtracting, Mr. Shapro?

Q. Do you have a piece of paper?

A. I have some in my pocket here, thank you.

Well, to the end of March towards March 30th, I will give the balance of his drawing account and then subtract the balance as of January 30th. [404]

Q. Well, except that might involve your explaining credits to the account.

In other words, was he credited with expenses to that account?

A. Well, as I say, those I would have to check back and look at some of the entries in here.

Q. Give it to me the way you just suggested.

A. There is a difference of roughly \$2600.00 between the drawings of the end of March and drawings at the end of—this entry is here, July.

Q. So in other words, according to your records, he drew approximately \$2600.00 from the business between—

A. March 31st.

Q. Between March 31st?

A. And the end of July.

Q. And the end of July, '54?

A. That is right.

(Testimony of Joseph N. Baum.)

Q. Would that figure include monies which might have been paid to him by Mrs. Barnhart as trustee?

A. Oh, yes, that would include all. This is his drawing account which should reflect all the sums given to him for his personal use.

Q. As far as you know, did it reflect all of the sums given to him for his personal use?

A. Well, if it was given—well, put it this way: If it [405] was given to him in the form of a check, it did.

Q. And you have no knowledge of any money being given to him in any other form, have you?

A. Not before the time of the filing of the petition in bankruptcy.

Mr. Shapro: That is the only time we are concerned with. I have no further questions.

Recross Examination

Q. (By Mr. Robert Jacobs): Mr. Baum, there have been references in the testimony in this case to a tape that was taken during a meeting with Mr. Ramsay, yourself, and Mr. Elliff in late September, '53. Do you have any knowledge as to what happened to that tape?

A. There were several tapes taken, Mr. Jacobs, and also some accountants' work sheets that were prepared. I am almost positive Mr. Ramsay took them with him.

Mr. Robert Jacobs: Do you have them?

Mr. Shapro: No such items.

(Testimony of Joseph N. Baum.)

Q. (By Mr. Jacobs): How many times was Mr. Ramsay present in San Jose at the business of Pine Supply Company during the latter part of September at which times you were also present?

A. I know that he was there on more than one occasion, Mr. Jacobs, but I couldn't definitely say just how many times he was there.

Q. Was it several? [406]

A. I would say it was several.

Q. Were these meetings held at the Pine Supply Company?

A. Well, as I say, the one meeting—or two meetings that I testified to, one was in Pine Supply offices of the Pine Supply Company and another one was over at the Hester Branch of the Bank of America.

I know that Mr. Ramsay was down there more times than that, and that usually at one time or another I am pretty sure that he was over at the Pine Supply warehouse.

Q. Now, on the meeting which you have referred to in your previous testimony as taking place, I believe, in the evening, and during which time you and Mr. Ramsay went over the books, was there an aging of the accounts?

A. There was. The accounts, what they did was actually pull out the physical invoices that were unpaid at that time, invoices to Mr. Elliff's customers.

And I remember distinctly that they were aged on a series of 14-column accountant's work sheets.

Q. Can you explain——

(Testimony of Joseph N. Baum.)

A. It would be something, the same type of a sheet that this material here was photostated from.

Q. Can you explain how that would be done and how that was done?

A. If I remember correctly, what they did was put the—and I do not remember whether someone called the figures and [407] the names off to me and I wrote them down, or whether I called them to somebody else and they were written down, but I do know that the customers' names were written down on one of these accountant's work sheets.

The total amount of the invoice was put in one column adjacent to the customer's name, and then in a series of columns to the right, the amounts of that particular invoice or the amounts of balances would be put down as to whether they were current, 30 to 60 days old; I think it was either current, 30 to 60, 60 to 90, and over that.

Now, that is as well as I can remember what happened.

Q. Do you have any recollection as to what proportion of Mr. Elliff's accounts fit in each category?

A. I'd only be a hazarding a guess, Mr. Jacobs. At that time, I think that better than 50 per cent—

Mr. Shapro: If your Honor please, if it is a guess, I move to strike it as a conclusion.

Q. (By Mr. Jacobs): Give us your best recollection as to what the accounts were at that period of time, Mr. Baum.

(Testimony of Joseph N. Baum.)

A. I would say that better than half of them were current.

Mr. Jacobs: Do you have those accounts receivable, Mr. Shapro?

Mr. Shapro: No, we don't have them.

Q. (By Mr. Jacobs): What proportion would be other than current? You say better than half. How much less than half [408] would be other than current?

A. Oh, possibly somewheres in the neighborhood of 40 per cent.

Q. And of that 40 per cent what proportion would be over 30 days and less than 60 days, or over 60 days and——

A. I couldn't truthfully answer that, Mr. Jacobs. I don't know.

Q. How long have you been a C.P.A., Mr. Baum? A. Almost six years.

Q. And how long have you been an accountant?

A. Since perhaps 20 years.

Q. You also testified that you were in the lumber business for some time, did you not, Mr. Baum?

A. That's right.

Q. And how long were you in the lumber business? A. Approximately two years.

Q. Can you give an opinion, Mr. Baum, as to what the value of accounts would be in the type of business that Mr. Elliff was running that were over 30 days?

Mr. Shapro: If your Honor please, I am going to object to that on the ground it calls for the

(Testimony of Joseph N. Baum.)

opinion and conclusion of the witness and no proper foundation has been laid.

After all, the witness has testified he can't even remember what proportion, or rather, what the amount or relative proportion would be. He says he has been in the lumber business for two years. We take that for what it's worth, [409] and he is an accountant, a C.P.A., for six years. The evaluation of an account or a series of accounts, your Honor, is a matter for an expert in the credit department, not an accountant.

Mr. Jacobs: I believe Mr. Baum is qualified to answer that question, your Honor, in light of the fact that he has been an accountant and he has been a C.P.A. and he has personal knowledge of the running of the lumber business and the accounts therein.

The Court: Counsel, doesn't it involve a credit standing of the customers of the company? This witness has not been qualified to give an opinion as to that.

Q. (By Mr. Jacobs): Mr. Baum, how long had you been the accountant for Mr. Elliff in the business of the Pine Supply Company prior to September of 1953, the end of September?

A. Approximately three months.

Q. Had you had an opportunity to examine his accounts and how they were paid? A. I did.

Q. Did you have knowledge of which accounts were paid on time and which accounts were delinquent for any period of time?

(Testimony of Joseph N. Baum.)

A. Some of them, yes.

Q. Did you make any examination of the credit standing of the people who had accounts with Mr. Elliff? [410]

A. No, I did not.

Mr. Jacobs: Is that qualifying him sufficiently, your Honor? I believe it does. He stated he was the accountant for Mr. Elliff for three months, that he had knowledge of Mr. Elliff's accounts, when they were paid and how they were paid.

Mr. Shapro: He also testified he made no investigation as to the credit standing of the individuals.

Mr. Jacobs: I might also point out, your Honor, that the witness prepared the reserve for bad debts which is in evidence in the December 31st balance sheet and it shows a total reserve of \$1800.00.

The Court: Well, there is nothing pending, no question pending now, counsel. If you desire to ask a question and an objection is made to it, I will then rule on it.

Q. (Mr. Jacobs): Mr. Baum, could you give us your opinion of the accounts of Mr. Elliff which were over thirty days old as to their proportionate value in being paid?

Mr. Shapro: To which question we object, if your Honor please, upon the ground that no proper foundation has been laid. It calls for the opinion and conclusion of the witness.

The Court: I think the objection should be sustained, counsel.

Q. (By Mr. Jacobs): When you were present

(Testimony of Joseph N. Baum.)

during the meetings with Mr. Ramsay and Mr. Elliff in the latter part of September of 1953, did Mr. Ramsay ever in your presence ask about [411] the personal financial condition of Mr. Elliff?

A. Not to my recollection.

Q. During these meetings just referred to, did Mr. Ramsay make any request as to information which he desired relative to the financial condition of the Pine Supply Company? A. Yes, he did.

Q. At any time in your presence were any of these requests refused?

A. Not to my knowledge.

Q. Did Mr. Ramsay ever ask you what Mr. Elliff's personal financial condition was?

A. No, he did not.

Q. You testified prior to this time to the meeting which was held in Mr. O'Connor's office some time around October 6th, 1953, and I believe you testified that there was a discussion of the trust agreement. Was there any discussion at that time as to who was to be the trustee, the trust agreement trustee?

A. Well, Mr. Jacobs, if I remember correctly I testified that we went into Mr. O'Connor's office to have the note of \$28,000.00 prepared. There was some discussion about that. But I am pretty sure that I testified to the fact that when we started—just commenced to talk about the trust agreement, it was a very brief conversation because Mr. O'Connor told us that he wasn't conversant with all of Mr. Elliff's financial [412] transactions, and that we

(Testimony of Joseph N. Baum.)

had best wait and see Mr. Pasquinelli about that. So there wasn't very much said at that time about the trust agreement.

Q. Who began the conversation?

The Court: You didn't answer the question, Mr. Baum, which was originally asked you. That is where we have difficulty where witnesses don't answer questions. The question was, was there any discussion as to who was to be the trustee?

The Witness: No.

Q. (By Mr. Jacobs): Who began the discussion, to the best of your recollection, at that meeting relative to the trust agreement?

A. I don't remember, Mr. Jacobs.

Q. At the meeting with Mr. Pasquinelli a few days later at which you were present, was there a discussion of the terms of the note?

A. Mr. Jacobs, there was a discussion about the terms of the note. But frankly, I don't remember whether it was in front of Mr. O'Connor or in front of Mr. Pasquinelli. I am pretty sure it was not in front of Mr. Pasquinelli.

Q. To the best of your recollection, were the amounts of the payments settled at the meeting with Mr. O'Connor on this note?

A. I am not sure, Mr. Jacobs, but I think so.

Q. You testified the other day regarding some notices of protest which you thought you had in your file in regard to checks made by Mr. Elliff to Twin City Lumber Company prior to the October transaction?

(Testimony of Joseph N. Baum.)

A. That is correct, Mr. Jacobs.

Q. Have you found those notices of protest?

A. Yes, I have. There are six of them in all. Three of them concern the checks which I had testified to were to my knowledge ever returned, that were part of the consideration in this October arrangement. The other three or four checks which had nothing to do with that arrangement whatsoever.

Q. And those last three that you referred to?

A. I have them arranged here in order of date.

Mr. Jacobs: We would like to offer these in evidence, if your Honor please, as trustee's next in order.

The Court: Exhibit 16.

(Thereupon the foregoing notices of protest were introduced into evidence as Exhibit 16.)

Q. (By Mr. Jacobs): To the best of your recollection is that the total of the protests that were made?

A. I could not be sure, Mr. Jacobs. I went through the records as fast as I could. But they have been gone through so many times previous to this that anything could have happened to any more of those notes had they been present at one time or another. [414]

Q. You testified that after the October transaction and up until December 31st, 1953, you continued on as the accountant for Mr. Elliff's business?

A. That is correct.

Q. During that period of time, were there any

(Testimony of Joseph N. Baum.)

other purchases made from suppliers other than Twin City by Pine Supply Company?

A. Yes, there were.

Q. Can you estimate how much in money was purchased from other suppliers during that period of time by Mr. Elliff?

A. I could try to testify from the records, Mr. Jacobs.

Q. Have you found the invoices that cover those purchases?

A. I have some of them here, but not all; approximately \$12,271.00.

Q. That covers the dates——

A. October, November and December of 1953. I might amend that answer. \$13,121.00.

Q. That is up until December 31st, 1953?

A. That is correct.

Q. Have all of these purchases been paid for to the best of your knowledge?

A. No, I do not believe they have.

Q. How much of this \$13,100.00 has been paid for? A. Oh, I would not be able to say.

Mr. Jacobs: I think that is all. [415]

Further Redirect Examination

Q. (By Mr. Huntington Jacobs): I have one or two questions on redirect examination. Did you say that you had certain invoices covering some of these purchases you have just referred to?

A. Yes, I did.

Q. Do you have them with you here?

(Testimony of Joseph N. Baum.)

A. Well, I have to check them over, Mr. Jacobs. Here is one of them from the Durable Plywood Sales Company dated October 31st, 1953.

Q. Any more?

A. I have to look through this file. Yes. Here's another one from the Harbor Lumber Company dated November 5th, 1953.

Q. Any others?

A. I think those are the only ones I brought with me, Mr. Jacobs.

Q. You have shown me two groups of invoices, one rendered by the Durable Plywood Sales Company under date of October 31st, 1953, and another rendered by Harbor Lumber Company, Inc., under date of November 5th, 1953.

Now I understood you to say that these were invoices rendered on purchases from other suppliers than Twin City Company after October, 1953 and before the end of that year.

A. That is correct.

Mr. Jacobs: For illustration now we will offer these [416] two invoices, your Honor, as the trustee's next in order.

The Court: As one Exhibit?

Mr. Jacobs: Yes.

The Court: Trustee's Exhibit 17 in evidence.

(Thereupon the foregoing documents were introduced as Plaintiff's No. 17 in evidence.)

Q. (By Mr. Jacobs): Now, Mr. Baum, am I correct in understanding you to say on your cross examination that the \$13,121.00 figure you have just given to Mr. Robert Jacobs was the aggregate or

(Testimony of Joseph N. Baum.)

approximate aggregate of the purchases during the month of November and December, 1953, from other suppliers than Twin City Company?

A. No, he—you asked me—I think I was asked total purchases. I would have to check and see whether that included anything from Twin City or not.

Q. I wanted to find out whether they included the Twin City purchase in November and whether they did not.

A. That included, that figure included purchases from Twin City Lumber Company also.

Q. It did?

The Court: Was the \$13,000.00 included?

The Witness: Yes, sir.

The Court: That isn't what you testified, Mr. Baum.

Mr. Jacobs: I didn't understand him to say—

The Witness: I understood the question was, what was the [417] purchases during that period of time. The purchases from Twin City that were included were approximately \$4800.00.

The Court: Then the answer is, the difference is \$13,000.00 less \$4800.00?

The Witness: Yes, sir.

Q. (By Mr. Jacobs): Mr. Baum, have you searched the records of the estate thoroughly—I will withdraw the thoroughly—have you made a search of the records of the estate to attempt to find this accounts receivable sheet that you referred to? A. I did.

(Testimony of Joseph N. Baum.)

Q. And did you find it or any indication of what had happened to it? A. No, sir.

Q. And is it your testimony the same is true regarding these papers that have been mentioned?

A. No record of the tapes in the files, either.

Q. What did you say was your recollection regarding what happened to the accounts receivable sheet?

A. To the best of my knowledge, I think Mr. Ramsay took those broad worksheets with him. I know I didn't take them and I know Mr. Elliff did not keep them.

Mr. Jacobs: I think that is all.

Mr. Shapro: No further questions.

The Court: That is all.

(Witness excused.) [418]

Mr. Shapro: May we have that one ledger remain here now, your Honor? This is the one that was marked for identification.

The Court: Yes.

Mr. Huntington Jacobs: If your Honor please, I had hoped to have present here this morning two certified copies for which I have asked the Referee, one of his lists of claims filed and the other is a transcript of his calendar notes regarding the proceedings before him in this Elliff case, and which I intended to tell your Honor the particular proceedings that pertained to the defense of the adverse claim of Mrs. Lannin. This has reference—this latter exhibit will have reference to the fourth count of the complaint. I am confronted with the

necessity of giving brief testimony myself regarding the work that was done, according to my recollection, in the defense of the Lannin claim and in the investigation of the substance of that claim which is mentioned in the trustee's complaint. So I will ask to be sworn.

C. HUNTINGTON JACOBS

volunteered as a witness, sworn.

Mr. Shapro: Your Honor, at this time on behalf of the Twin City Lumber Company we move to exclude all or any of the testimony in support of the fourth *complaint* of this complaint on the ground that the fourth count does not state counts against the defendants or any of them. [419]

If your Honor will examine the fourth count you will find that it purports to charge the defendant——

The Court: Mr. Shapro, you have made your position. I think it will be quicker to take this testimony and then present whatever arguments you have in reference to it at the same time.

Mr. C. Huntington Jacobs: The testimony will take about five minutes, your Honor.

The Court: All right.

Mr. C. Huntington Jacobs: My name is C. Huntington Jacobs. I am a member of the State Bar of California and was a member during all of the times to which I shall refer in my testimony. I have been since 1921. I am the attorney for Ralph Williams, the trustee in bankruptcy of the estate of George F. Elliff.

(Testimony of C. Huntington Jacobs.)

In September I was also the attorney for the Receiver in bankruptcy of the same estate prior to the classification of the trustee. In September of 1954.

I obtained from the Referee in bankruptcy, J. Abrott, to whom that case had been referred, an order to show cause which directed Mrs. Lannin to show cause why any of the property of the bankrupt in her hands should not be administered upon as a part of the estate. That was the substance of the order applying to her. That was duly served and Mrs. Lannin answered setting up the trust agreement that is in [420] evidence in this case and laying claim to the entire stock in trade of the bankrupt alleging that she had had warehouse receipts covering the entire stock in trade.

That order to show cause was obtained by the Receiver and proceedings upon it were prosecuted by the trustee upon his qualification.

The trustee obtained a stipulation of Mrs. Lannin and other claimants to the same stock in trade whereby the stock in trade was duly sold and the bankruptcy proceeding and the proceeds were substituted for the merchandise.

That sale was made by the trustee and realized the sum of \$7,000.00 which was the highest bid. The sale was confirmed by the Referee, from the entire stock in trade that was on hand at the time of the sale and that included the entire stock in trade that had been on hand at the time of the bankruptcy, with some minor exceptions, I understand.

(Testimony of C. Huntington Jacobs.)

Proceedings respecting Mrs. Lannin's claim were interspersed with hearings upon the other adverse claims to this same stock in trade and extended over a considerable period in consequence of that.

There were some ten different hearings, variously, in Oakland and San Jose, most of them in San Jose. My office is in San Francisco and I have an office in Redwood City also from which I mainly handled this case.

The investigation that was made of the basis of her claim [421] included general examinations under 21-A, some five of them, which were variously had in San Jose and Oakland and one in Los Angeles.

I had instituted and did ancillary proceedings in Los Angeles for the purpose of taking the testimony there of Mr. Hunter and of Mrs. Swanson, both of them connected with the defendants.

The matter was submitted for decision, the matter of the Lannin claim was submitted for decision in November of 1954. It was eventually passed upon as I recall it in April of this current year.

The examinations in Los Angeles took place shortly after the submission. They did not develop anything that required reopening the case, at least in my opinion or that of my adversary, Mr. Robert Jacobs, who represented Mrs. Lannin at all these proceedings.

The amount of time that I devoted to the case would amount to approximately 12 full eight hour days. I think that is a conservative statement of it.

(Testimony of C. Huntington Jacobs.)

The amount of expense incurred by the estate aggregated approximately \$370.00, as I recall it.

The case included an application by Mr. Jacobs, Mr. Robert Jacobs, for the joinder of Twin City, as additional party respondent. The trustee supported that position and an order was made which provisionally joined Twin City Company [422] subject to the right of Twin City Company to object to the summary jurisdiction.

The objection was made by Twin City Company later and Mr. Robert Jacobs filed a memorandum opposing the motion. I also filed a memorandum of opposing it on behalf of the trustee.

However, the motion was granted and the Twin City Company was dismissed from the summary proceeding.

Mr. Shapro, I believe you have a copy of the order dismissing Twin City?

Mr. Shapro: I do.

Mr. Jacobs: We will offer this order which is produced by Mr. Shapro. It is a certified copy of the order of dismissal.

(Thereupon the foregoing certified copy of order was introduced as Plaintiff's Exhibit No. 18.)

Mr. Jacobs: I found a memorandum on behalf of the trustee at the conclusion of that case, summaries to voluminous testimony that had been taken in it and the law that I considered was applicable to it.

The memorandum was approximately 21 pages

(Testimony of C. Huntington Jacobs.)

long and I cut it down from a much longer one. The matter appeared to me at least to be somewhat complicated.

I think that completes my testimony unless there is cross examination. [423]

Cross Examination

Q. (By Mr. Shapro): Just a couple of questions, Mr. Jacobs. The time that you have estimated that you put in in connection with this summary proceeding and the response to which the estate was put in connection with those proceedings, I take it, refers to the hearings and includes the investigation and expenses on the hearings, to determine adverse claims other than those of Mrs. Lannin?

A. No, Mr. Shapro. I tried to confine myself to the time spent in investigating and in opposing the Lannin claim. I will say this. It does include the investigation of the whole Elliff account because that appeared to me to be pertinent to the question of insolvency.

Q. Actually, as a result of the decision of the Referee, which is embodied in the last Exhibit introduced, the certified copy of the order of January 1955, with the exception of the proceedings leading up to that order, Twin City Lumber Company was not a party before the Referee in connection with those proceedings, is that right?

A. No, that is true. That is true. My client tried to do that and he was successful in presenting it.

(Testimony of C. Huntington Jacobs.)

Q. Tell me, to your knowledge has Twin City Lumber Company filed any complaint in the bankruptcy proceedings?

A. No, I think they have not, Mr. Shapro.

Q. The time for filing claims against the bankruptcy estate [424] of Elliff has expired?

A. The time for filing claims on parity with the claims originally claimed has expired, of course, as you know.

They can still file a claim.

The Court: When did the time expire?

The Witness: It expired six months after the date of the first meeting, if your Honor please. The original date—the original date set was October 1st, if I am not mistaken.

The Court: October 1st, '54?

Mr. Shapro: '54.

Mr. Jacobs: That is right.

Q. (By Mr. Shapro): The original time for filing claims under Section 57 M of the bankruptcy act would have expired April 1st of '55. The qualification that counsel refers to is in connection with litigated matters and the statute speaks for itself on that. There are exceptions.

Mr. Jacobs: Yes, yes. But no proof of claim has been filed according to my latest inspection of the record. I am producing a certified copy of the Referee's list of claims that have been filed, your Honor.

Now I ought to add, if I may, my estimate of

(Testimony of C. Huntington Jacobs.)

the value of services, I suppose. The Court is much better qualified than I am to appraise them.

But I think that a moderate estimate of the reasonable value—that is not saying the Referee will agree with me, [425] he will have to manage the allowance, I haven't received anything as yet—I believe a moderate estimate of the value of the services rendered in opposing the Lannin claim and obtaining the order denying it would be \$1500.00, and I refer merely to services.

Mr. Shapro: Well——

Mr. Jacobs: Now, if your Honor please, subject to the production of those two certified copies that I have already referred to, the plaintiff can rest.

I believe that I shall have them here by 3:00 o'clock. That is the last word I got from Judge Abrott's office this morning.

The Court: By when?

Mr. Jacobs: 3:00.

The Court: 3:00?

Mr. Jacobs: I understand so. But that would complete the case for the trustee.

Mr. Shapro: The defendants will proceed, your Honor, subject of course to the motion to exclude evidence that we made with respect to this fourth count.

If it please the Court, may we have the morning recess now?

The Court: All right.

(Recess.) [426]

Mr. Shapro: Your Honor, Mr. Robert Jacobs has suggested that he conclude as cross complainant before we put on the defense. If that is satisfactory with the Court we are agreeable, your Honor.

The Court: All right.

Mr. Robert Jacobs: Mrs. Lannin, will you take the stand please?

The Court: The witness has been sworn.

MRS. PEARL K. LANNIN

called as a witness, previously sworn.

Direct Examination

Q. (By Mr. Robert Jacobs): Mrs. Lannin, will you tell the Court when you first came to the conclusion that the transaction that took place in October of 1953, involving the note, the guarantee, the trust agreement, and the transfer of stock in trade, was of a fraudulent character?

Mr. Shapro: To which question we object, if your Honor please, upon the ground it is argumentative and calls for the opinion and conclusion of the witness.

Mr. Jacobs: If it please the Court, part of the pleadings in this case sets forth that Mrs. Lannin was not aware of the nature of the transaction until a certain period of time; that did subsequently became aware. This question is merely aimed at showing that part of the pleadings.

The Court: Is there any question of the statute? [427]

(Testimony of Mrs. Pearl K. Lannin.)

Mr. Shapro: No, not the statute.

The Court: Statute of Limitations. How is it material then, counsel?

Mr. Jacobs: The question of the knowledge of Mrs. Lannin may be material, your Honor, in that she is requesting relief from Twin City, affirmative relief.

The question of her good or bad faith therefore becomes a question that must be decided by this Court. Her knowledge, of course, is an essential element of good or bad faith.

The Court: I think the basis of such claim she may have would be upon the facts that she can develop and not upon her conclusions that the thing was fraudulent.

Mr. Jacobs: This question, your Honor, is merely as to time, when in time.

The Court: But there is no question of statute involved, so that question doesn't make any difference, does it?

Mr. Jacobs: I sincerely——

The Court: I mean, nobody is charging her with——

Mr. Jacobs: No. As I stated to the Court before, her good faith is certainly an element that must be shown in order for Mrs. Lannin to get any affirmative relief from Twin City Lumber Company.

The Court: Is there any contention that she——

Mr. Jacobs: To that part of the pleading which mentioned her knowledge, there was a denial, a lack of information and [428] belief, your Honor. There-

(Testimony of Mrs. Pearl K. Lannin.)

fore, it is our contention that we should show when her knowledge was arrived at.

Mr. Shapro: The mere fact that it pleaded and denied doesn't mean that it is material, your Honor.

As far as we are concerned, we submit that the time when she learned for the first time that this transaction was something of which she could complain is immaterial. The point is can she complain of it?

Those are the facts that she is bound to produce.

The Court: I am inclined to think the objection is good, counsel. The objection may be sustained.

Q. (By Mr. Robert Jacobs): Mrs. Lannin, did you attend the hearings which took place regarding the bankruptcy proceeding against George Elliff?

A. I attended those in San Jose.

Q. You attended those in San Jose. And at those hearings, did you listen to the evidence which was presented by the trustee in bankruptcy in regard to the transaction which we have been discussing in this trial? A. Yes.

Q. Was that the first time that you were aware, Mrs. Lannin, of the facts surrounding this transaction?

Mr. Shapro: That is the same question, your Honor, to which we make the same objection. It is incompetent, irrelevant, immaterial and calls for the conclusion of the [429] witness.

The Court: She has already testified as to some facts that she was aware of way back in October of '53.

(Testimony of Mrs. Pearl K. Lannin.)

Mr. Jacobs: That is exactly when this is pointed to, from October on until the hearings on this matter, your Honor, she was aware of some of the facts of October, and further facts she became aware of during the hearings in this matter.

The Court: Well, this question however, she couldn't answer the question because she has heard of facts and has testified to them as to what she learned in October 1953.

Now if you want to show that she had no conversation with anybody between October 1953 and the time of this hearing about this matter, why, I will permit you to show that, if that is what you want to do.

Q. (By Mr. Jacobs): Did you have any conversation, Mrs. Lannin, in October of '53 or thereabouts with anyone representing Twin City Lumber Company?

A. I don't believe—no, I am not positive.

Q. Did you discuss with anyone representing Twin City Lumber Company the note and trust agreement prior to the hearings on the Lannin adverse claim?

Mr. Shapro: I object to that question if your Honor please upon the grounds it assumes a fact not in evidence, namely that she talked to anybody about the trust agreement, [430] both with respect to the note and the trust agreement. The witness' testimony, your Honor, previously is that she talked about the note to Mr. Hunter.

The Court: I take it it is preliminary. If the

(Testimony of Mrs. Pearl K. Lannin.)

answer is yes then we can find out what the conversation was.

Q. Was that 1953—read the question.

(Question read.)

The Witness: Would that be in 1953?

Mr. Jacobs: That would be the hearings on the Lannin adverse claim, to refresh your recollection, Mrs. Lannin, were during September and November of 1954.

A. I talked to Mr. Hunter previous to that, yes. But I misunderstood the year.

The Court: You talked to Mr. Hunter; I take it you testified in August of '54 when he was requesting some payments to be made on the note, is that correct?

The Witness: Yes, that is right.

The Court: Now from the time of October 1953 to October 1954—to August '54, when you talked to Mr. Hunter, did you talk to anyone in connection with Twin City Lumber Company concerning this transaction in any way?

The Witness: I don't recall of talking to anyone in Twin City.

The Court: May I have her answer read? I didn't hear it.

(Answer read.) [431]

Q. (By Mr. Jacobs): Did you during this period of time, namely from October 1953 until September or November of 1954 regarding the trust agreement and the note?

A. I am sorry, I didn't quite catch that.

(Testimony of Mrs. Pearl K. Lannin.)

The Court: Read it.

Q. (By Mr. Jacobs): Did you talk to anyone other than from Twin City? You testified you didn't talk to anyone except Mr. Hunter in Twin City. Did you talk to anyone else regarding the trust agreement and the note?

A. Well, perhaps to the attorneys.

The Court: To whom?

The Witness: The attorneys.

The Court: By that you mean——

The Witness: My attorneys.

The Court: Mr. Robidoux?

The Witness: Yes, and Mr. Jacobs.

The Court: Anyone else, any other attorneys besides Mr. Robidoux?

The Witness: I don't——

The Court: During that period?

The Witness: I don't recall any, no.

Q. (By Mr. Jacobs): Did you discuss the facts surrounding the October transaction with your attorneys?

Mr. Shapro: I object, if your Honor please, upon the ground that it is self serving and calls for hearsay and [432] is not binding on the defendants, her conversation with her own counsel.

The Court: She did—I don't know when you mean, counsel. She did because at the October transaction with Mr. Robidoux she has already testified about that.

Now are you referring to that or referring to some later time?

(Testimony of Mrs. Pearl K. Lannin.)

Mr. Jacobs: I am referring to later than that.

The Court: All right. Ask her October if she talked to Mr. Robidoux about that matter until a certain time.

Q. (By Mr. Jacobs): Did you discuss with Mr. Robidoux after the October transaction the facts surrounding the guarantee and trust agreement prior to the hearing on the Lannin claim?

The Court: Now that is prior to September and October 1954?

Mr. Jacobs: September and October and November of 1954.

The Witness: Yes. I talked—after I talked to Mr. Hunter, I talked to the attorney, Mr. Robidoux or you, or both of you.

Q. (By Mr. Jacobs): Did you discuss with them the facts surrounding the October transaction?

A. Well, I can't remember just what we discussed. I know that after Mr. Hunter was at my home, I talked to them about his wanting payments. [433]

Q. You talked to him, about Mr. Hunter wanting payments?

A. And that would be the trust—the note and the trust agreement together.

Mr. Shapro: I move to strike the latter part of that, if your Honor please, upon the ground that—“that would be the trust agreement and the note”—as her conclusion.

The Court: Well, it may remain.

(Testimony of Mrs. Pearl K. Lannin.)

Mr. Jacobs: Did you discuss with anyone the facts surrounding the October transaction after the hearings on the Lannin claim?

A. Well, it would be just the attorneys.

Q. You talked to your attorneys about it, is that your testimony? A. It would be, yes.

Q. Did you talk to anyone else after the Lannin claim in that regard?

A. I can't recall if—at times I talked to Mr. Elliff a few times, but I wasn't talking you know, regarding the claim particularly.

Q. Did you talk to Mr. Elliff during the period after the October transaction and prior to the hearings on the Lannin claim in regard to the October transaction?

A. Well, I may have. I can't recall just, you know, what happened in there. It was over a long period, these hearings. At different times you talk to people just like I have talked [434] to different people here.

Q. Do you remember what your conversation was with Mr. Elliff at any of these particular times?

Mr. Shapro: I object to the question if your Honor please, on the grounds that it calls for hearsay and it is self serving, not binding on the defendants.

The Court: I am inclined to think the objection is good. Counsel, nobody is charging this lady with any bad faith that I know of.

(Testimony of Mrs. Pearl K. Lannin.)

Mr. Jacobs: Well, your Honor, I have no further questions.

The Court: I think she has testified to her knowledge of the transaction as it occurred around October, 1953. There is nothing in that testimony to indicate that she is in any way involved in any claim of bad faith. Isn't that correct, gentlemen?

Mr. Shapro: That is correct, your Honor.

Mr. Jacobs: That is correct.

The Witness: Your Honor, I don't know if I can answer or say anything or not?

The Court: You don't have to answer. I am saying that nobody is charging you with bad faith at all, Mrs. Lannin. I think I understand the circumstances and what happened.

Mr. Jacobs: No further questions.

Mr. Shapro: I have no questions. [435]

The Court: That is all.

Mr. C. Huntington Jacobs: We have none.

(Witness excused.)

Mr. Robert Jacobs: Now if your Honor please, in light of the allegation in the cross complaint that damages were suffered by Mrs. Lannin because of the transaction and which damages we are asking from Twin City Lumber Company, I would like to be sworn and testify as to Mrs. Lannin's expenses.

MR. ROBERT JACOBS

appearing as a witness, sworn.

Mr. Shapro: For the record, at this time I move

(Testimony of Mr. Robert Jacobs.)

to exclude any evidence in support of the claim for damages set forth in the cross complaint.

The Court: Motion is taken under submission. Go ahead.

Mr. Robert Jacobs: My name is Robert N. Jacobs——

The Court: What are you going to testify to, the value of the services you performed?

Mr. Jacobs: Yes, your Honor.

The Court: Why don't you make that statement as to what it is and if there is any cross examination, they may examine you. First, do you have a time amount that you spent, roughly?

Mr. Jacobs: Yes, your Honor.

The Court: How much time?

The Witness: Roughly eight full days, your Honor. [436]

The Court: That you spent in prosecution of this Lannin case?

The Witness: Right.

The Court: That is exclusive of this suit?

The Witness: Right.

The Court: And do you desire to give a value as to that?

The Witness: I estimate roughly, your Honor, my services in that relation at \$1000.00. I was present at all the hearings which the attorney for the trustee has previously testified to, and traveled to Los Angeles, to Oakland, to San Jose and so forth.

The Court: Are there some expenses in addition then?

(Testimony of Mr. Robert Jacobs.)

The Witness: The expenses of the trips to Los Angeles, to San Francisco, and to Oakland I would estimate at about \$150.00, your Honor, included in that is a third party claim proceeding in San Francisco which occurred just previously to the bankruptcy of Mr. Elliff.

The Court: Is your office in San Jose?

The Witness: San Jose.

Cross Examination

Q. (By Mr. Shapro): Just one question, your Honor. This third party claim in San Francisco, does that have anything to do with the Twin City Lumber Company? A. No. [437]

Redirect Examination

Q. (By Mr. C. Huntington Jacobs): Mr. Jacobs, do you have a copy, a certified copy of the Referee's order denying the claim of Mrs. Lannin?

A. I do, Mr. Jacobs.

Q. If I said third party claim, I meant to say adverse claim. You have seen it, Mr. Shapro?

Mr. Shapro: No, I have never seen it.

Mr. C. Huntington Jacobs: I am showing you an order denying the adverse claim of Mrs. Pearl K. Lannin dated October 18th, 1955, and bearing the stamped signature of Bernard J. Abrott, and bearing also a certification by Judge Abrott. Is that the order to which you have just referred?

Mr. Robert Jacobs: That is the order to which I have just referred, Mr. Jacobs.

(Testimony of Mr. Robert Jacobs.)

Mr. C. Huntington Jacobs: For completion of the record, your Honor, we will offer this as trustee's next in order.

The Court: Exhibit 19.

(Thereupon the foregoing order denying the claim of Mrs. Pearl K. Lannin was introduced as Plaintiff's Exhibit No. 19.)

The Court: Anything further?

Mr. C. Huntington Jacobs: Nothing further.

The Court: Is that all?

Mr. Shapro: Nothing further. The defendants will call Mrs. Bea Swanson. [438]

MRS. BEA SWANSON

a witness called by the defendants, sworn.

The Court: State your full name, please.

The Witness: Mrs. Bea Swanson.

Direct Examination

Q. (By Mr. Shapro): The first name is Bea, B-e-a, is that correct? A. That is right.

Q. And you are employed by Twin City Lumber Company. A. Yes, I am.

Q. In the latter part of 1953 and up to that present time you are and then were the office manager of that concern in Los Angeles?

A. That is right.

Q. And among the records of the office of which you were in charge, was there included the accounts and records of the Twin City Lumber Company and its business with George Elliff of Pine Supply Company? A. Yes.

(Testimony of Mrs. Bea Swanson.)

Q. And also the preceding partnership of Abbot Lane? A. Yes.

Q. Have you brought with you to this courtroom at our request certain of the records of Twin City Lumber Company in connection with Pine Supply?

A. Yes, I have. [439]

Q. Now, Mrs. Swanson, from your records can you tell the Court whether or not the \$1200.00 check of April 23rd, 1954 given to Twin City Lumber Company by Mr. Elliff was ever returned for non payment? A. No, it wasn't.

Q. Can you tell, Miss Swanson, from your records whether or not there was sold to Mr. Elliff during the period of the warehouse from May to October of 1953 and put in the field warehouse plywood?

A. Well, I would have to look at the invoices. I don't remember.

Q. The invoices. May I have Exhibit 4?

I show you Plaintiff's Exhibit 4, Mrs. Swanson; will that assist you?

The Court: If this testimony is from the record, can't counsel stipulate what the record is?

You have both examined it, haven't you?

Mr. Shapro: I know I have. The purpose of the testimony is, your Honor, that contrary to the testimony of Mr. Elliff, there was plywood sold by us and warehoused by us.

The documents there indicate the sale from the witness. I will produce the warehouse receipts.

Mr. C. Huntington Jacobs: I didn't know there

(Testimony of Mrs. Bea Swanson.)

was any controversy at all about some plywood. I might concede that it is contrary to Mr. Elliff's testimony. This is a matter [440] for argument. But there certainly were sales of plywood.

Mr. Shapro: And is it admitted that the plywood that was sold according to the invoices in Exhibit 4 were put in the field warehouse?

Mr. C. Huntington Jacobs: Well, I have no reason to believe otherwise.

Mr. Shapro: Is it so stipulated? If not, I will prove it. The witness Elliff, your Honor, testified positively that we sold him no plywood and no doors. I am proceeding to say that we sold him plywood; we warehoused it; we did not sell him any doors.

Mr. C. Huntington Jacobs: The plywood, some plywood was put in the warehouse. There is no question about that.

The Court: All right. Do you have the figure there?

Mr. Shapro: I am trying to show it, your Honor. But apparently I can't—

The Witness: Yes, it's invoice 667.

The Court: What?

The Witness: It's invoice 667.

The Court: All right. How much plywood?

The Witness: \$4051.53.

Q. (By Mr. Shapro): I will save you some time by saying there are no more. Those are the only invoices because I have examined them.

Do you have a warehouse receipt showing that the

(Testimony of Mrs. Bea Swanson.)

plywood [441] that you have just identified from this invoice was put in the field warehouse?

Mr. C. Huntington Jacobs: That was the only purpose, we will stipulate to——

The Witness: Yes.

Q. (By Mr. Shapro): Now, Mrs. Swanson, what charges in addition to the invoices were made on the warehouse account by Twin City Lumber Company against Elliff?

A. I didn't understand that.

Q. Besides the invoices that were charged against Mr. Elliff by Twin City Lumber Company, additional charge was made, was it not?

A. Interest.

Q. And at what rate and in what amount?

A. Well, we took the high and the low for the month, got an average, charged him six per cent.

Q. Six per cent per annum? A. Yes.

Q. Were there any other charges that you know of that were made other than as the invoices indicate and the interest charged that you have just testified to as far as the Elliff account with Twin City is concerned?

A. Well, \$21.00 protest fee and returned checks that went to make up the note.

Q. Nothing else? [442]

A. Nothing else.

Q. Now Mrs. Swanson, the 2 per cent cash discount that is referred to in the invoices that are part of Exhibit 4 was given and extended to Mr. Elliff by Twin City under what conditions?

(Testimony of Mrs. Bea Swanson.)

A. On the 30 per cent that he was to pay us in cash, he was allowed 2 per cent discount on that portion.

Q. Miss Swanson, I show you a document that purports to be a financial statement of Pearl Lannin as of June 26th 1953 and ask you whether you have seen that document before?

A. Yes, I have.

Q. And where did you see it?

A. In my office.

Q. In the office of Twin City?

A. Twin City Lumber Company.

Q. And was it part of the file of Twin City Lumber Company on the Elliff account?

A. Yes, it was.

Mr. Shapro: At this time, if your Honor please, we will offer in evidence the financial statement of Pearl K. Lannin as of June 26th, 1953.

The Court: Well, it may be received and marked Exhibit J.

The Court: When was it in the office, Mrs. Swanson? When did you receive it? [443]

The Witness: Well, I don't remember. I would have to look and see if there is any date on it.

The Court: It has a date, the date was given to you in the question, June 26th, 1953. Did you receive it at that time? What time?

A. Well, it was probably several days after that.

The Court: Are you guessing? Do you have any way of knowing when you received it?

The Witness: May I look at it again?

(Testimony of Mrs. Bea Swanson.)

The Court: Well, this is stamped November 28th——

Mr. Shapro: No, that is the Court stamp.

The Court: Oh.

Mr. Shapro: The time of receipt will be supplied by another witness, the one who actually got it.

The Witness: Well, I can't remember.

Mr. Shapro: Your Honor, it developed that the Exhibit 4, Plaintiff's Exhibit 4, was short one invoice. To complete the record which we have now made available and counsel is prepared to stipulate, it may be added to and become a part of Exhibit 4.

Mr. C. Huntington Jacobs: That is correct.

Mr. Shapro: And there were two invoices which were omitted from the Exhibit 12, which is the Abbot Lane Company account, which we have now obtained and counsel is prepared to stipulate they may be added to Exhibit 12 to complete the [444] record.

The Court: Clip them to the Exhibit.

Mr. C. Huntington Jacobs: All right.

Mr. Shapro: I have no further questions of this witness.

Cross Examination

Q. (By Mr. C. Huntington Jacobs): Mrs. Swanson, have you told us all of the accounts that you kept as bookkeeper for Twin City Company with the Pine Supply Company?

Have you told us all of the accounts that as bookkeeper for Twin City Company you kept of dealings between Twin City Company and Pine Supply

(Testimony of Mrs. Bea Swanson.)

Company? A. Today, you mean?

Q. Yes, have you mentioned them all?

A. No.

Q. What else was there?

A. Well, we had Abbott Lane to begin with and then Pine Supply, then we had the warehouse account and the interest account; later, the unpaid warehouse account plus returned notes were set up or returned checks were set up in the note account.

Q. You had a special designation for that returned check account, did you not? You had a certain number that indicated it, number 376-A or something of that sort? A. No.

Q. Did you not? [445]

A. No, I don't think we did.

Q. 117-B, does that refresh your recollection?

A. Yes.

Q. And in that account you kept a record of all of the returned checks, did you?

A. That is right.

Q. That is, that were not paid on presentation, checks that had been received from Pine Supply Company? A. That's right.

Q. Have you got that account with you?

A. That's——

Mr. C. Huntington Jacobs: It is in evidence. It is the warehouse account, so called, that is 117-B. What is the number of that?

Mr. Shapro: It is the big yellow sheet.

Mr. C. Huntington Jacobs: Mr. Shapro, this is account 117. This is not account 117-B. There were

(Testimony of Mrs. Bea Swanson.)

two separate and distinct accounts, were there not? One of them account number 117, which is what you referred to as the warehouse account, and the other an account covering bad checks and one or two other items, isn't that right?

The Witness: That is right.

Q. (By Mr. C. Huntington Jacobs): Have you got that latter account with you?

A. Yes. [446]

Q. Will you show me the 117-B account?

A. There it is. Mr. Baum has a sheet like that too.

Q. This isn't the copy, apparently?

A. That is one of them.

Q. Yes, 117—

A. But he got this one too down in Los Angeles.

Q. Did he? A. Yes. That is bad checks.

Q. I notice that on this account 117-B which you have just shown us and are showing us now, it starts out with notation of "Three returned checks."

One entry is the first entry and is dated October 8th, 1953, is that correct?

A. And the other two are entered on the same date. The first one is for \$741.26, the second one for \$7310.98, the third for \$2500.00.

Are there any more returned checks entered on this 117-B? Just those three? A. That's all.

Q. This account does not show what time these checks were received by your company which was

(Testimony of Mrs. Bea Swanson.)

then I understand Twin City Company? Do you have that information with you?

A. No, I don't have it with me. But it was somewhere around the 1st of October. We banked in San Francisco, you know, and by the time the checks got to us it was just probably [447] after the first of the month.

Q. I see. Now your procedure was as I understand it from your testimony, first to enter the check when received as the credit on the open account, and then if the check was not paid you entered that check on the bad check account, as I recall it, this 117-B, namely? A. That's right.

Q. Is that right? A. Yes.

Q. You did not in any instance charge back as a charge against the open account the amount of the bad check, is that correct, you charged——

A. No, not if we didn't put it back through the bank again, if we weren't going.

Q. Well, if you did put it back through the bank and it still was not paid, you still did not enter it as a debit on the open account, did you? A. No.

Q. Instead of that, you entered it as a debit on that bad check account, am I right?

A. That is right.

Mr. Shapro: If your Honor please, so there may be no confusion. The bad check account, the account in question, 117-B is headed "Notes Receivable". I mean I don't want any confusion. [448]

Mr. Jacobs: Yes. It is entered "Notes Receiv-

(Testimony of Mrs. Bea Swanson.)

able". But I am trying to identify it specifically because I am talking about bad checks.

Q. Is the account that you have just referred to and just shown us which is numbered 117-B—that is not the same account as 117, is it? A. No.

Q. And it is also not the same account as the, what I have referred to as the open account which covered the invoices and the payment made on account of the invoices?

A. The credit was on 117-B when we originally got the check. Then when it bounced I put it in the 117-B.

The Court: Just a moment. Read that answer.

(Answer read.)

The Court: Is that what you mean to say?

The Witness: That is what I mean to say.

The Court: I don't think you do.

Mr. Jacobs: I don't think so, your Honor.

The Court: Read it again.

(Answer read.)

Q. (By Mr. Jacobs): You don't mean do you that it was—that the credit was originally given on this 117-B which I am calling the bad check account; a credit wouldn't be given on that in the first instance, would it?

A. The credit was given. [449]

Q. I don't want to argue about it, but I do want to straighten your testimony out if I can.

A. The credit was given on 117-B.

The Court: But you said it was given on 117-B, that is what we are calling your attention to.

(Testimony of Mrs. Bea Swanson.)

The Witness: Oh, I am sorry. The 117 is the warehouse account and that is where the credit was first given when we received the check. Then when it bounced it was put over on this note account, the 117-B.

Q. (By Mr. Jacobs): I see. Now will you please look at the Trustee Exhibit No. 4, look at this portion of it which is a photostat of the ledger sheet, and tell us whether that is account 117 on your books. A. No, it isn't.

Q. 117 is a separate and distinct account, is it, from the account comprising Exhibit 4?

A. Yes, that's right.

Q. Well, I notice here on this Exhibit 4 there are a number of credits given, I presume for checks that came in, am I right?

A. Well, not always are they checks. Some of that is the 70 per cent credit we gave him on the warehouse account.

Q. I see. However, this includes all the credits, does it not? A. Yes. [450]

Q. For merchandise that was supplied by Twin City to Pine Supply Company? A. Yes.

Q. Now were you the bookkeeper at the time on September 14th 1954 when this account comprising Exhibit 4 was brought to a balance of zero?

A. I was.

The Court: What is the date of that?

Mr. Jacobs: September 14th, your Honor, 1953.

Q. And on that same date of September 14th, 1953, how did the warehouse account stand; was

(Testimony of Mrs. Bea Swanson.)

Mr. Elliff indebted to the company on that account at the time? A. Yes, he was.

Q. In what amount? A. By \$25,468.29.

Q. On October 6th 1953 according to Exhibit 4 there was nothing due on Exhibit 4 account, as I call it, the open account. Does that agree with your records? A. That's right.

Q. And on October 6th, 1954, was Mr. Elliff indebted according to your warehouse account, that is, the number 117, did he owe you any balance at that time? A. 1954?

Q. 1953. A. Yes, \$28,116.63. [451]

Q. What did that \$28,116.63 include, does your record show that?

A. Yes. There are those three returned checks, \$21.00 protest fees, \$127.34 interest, and the balance of the warehouse of \$17,416.05.

Q. How much interest did you say?

A. Six per cent.

Q. I beg your pardon? A. Six per cent.

Q. What was the amount in dollars?

The Court: \$127.34.

Mr. Jacobs: Thank you, sir.

Q. You have no knowledge of any charges that might have been made for brokerage, do you, by Mr. Elliff of Twin City?

A. I don't know what you mean by brokerage.

Q. Handling the transaction whereby Twin City Company procured any—any transaction whereby Twin City Company procured from others and furnished to Elliff, that is, under the name of Pine

(Testimony of Mrs. Bea Swanson.)

Supply Company, merchandise for his business?

A. No.

Q. Do your books show any transaction?

A. No, they don't.

The Court: Suppose we take a recess at this time, counsel. What is counsel's estimate? Are we going to finish today? [452]

Mr. Shapro: I doubt it, your Honor.

Mr. Jacobs: I will complete my cross examination of this witness in not over ten minutes.

Mr. Shapro: But we have three more witnesses, your Honor.

Mr. Jacobs: But I don't want to do it now, necessarily, your Honor.

The Court: That is all right.

(Recess.)

(Thereupon this hearing was adjourned until 2:00 o'clock p.m.) [453]

Monday, November 28, 1955

2:00 p.m.

MRS. BEA SWANSON

a witness called by the defendants, previously sworn.

Cross Examination—(Continued)

Q. (By Mr. C. Huntington Jacobs): Mrs. Swanson, I want to be sure that we have covered the records that were kept by Twin City Company of its financial dealings with Pine Supply Company or with George F. Elliff individually.

(Testimony of Mrs. Bea Swanson.)

If I understand you correctly, you kept three accounts, the open account which comprises Exhibit 4—well, I will proceed while we are looking for them.

That was the one that you examined this morning that was called the open account and it includes the invoices, a lot of invoices attached to it, that was the one that was brought to a balance of zero in September, around September 14th, 1953.

By the way, before we leave that, what is your number for that one; you had each of these accounts numbered, did you not?

A. No. That was just accounts receivable. That wouldn't have any special number.

Q. That didn't have any number at all?

A. No. [454]

Q. There was that one and then there was the warehouse account transcript of which is made by Mr. Baum. That's number 117 and that one covered 70 per cent advance, did it?

A. Yes, it did.

Q. On each of these invoices?

A. Yes.

Q. Did it cover any interest on the 70 per cent advance?

A. No.

The Court: Did you answer no?

The Witness: No.

Q. (By Mr. Jacobs): Did it cover anything else than the 70 per cent?

A. That is all it covered, 70 per cent.

Q. I see. Now I notice that there are several credits on this warehouse account. Are those the same credits that were entered on the open account?

(Testimony of Mrs. Bea Swanson.)

A. Yes, they would be.

Q. The same items were entered as credits on the warehouse account that were entered on the open account?

A. Well, I am not sure if it would be in this particular amount.

Q. Are these items all items of credit that were entered also on the open account? A. Yes.

Q. And those are payments, are they, on account, these [455] credits are payments on account of the 70 per cent? A. Yes.

Q. Advance? A. Yes.

Q. Then you had the third account which was what I have been calling the bad check account and was entitled on your ledger "Note Account." And you have entered there as you have testified three bad checks that never have been made good?

A. That's right.

Q. And as I understand it, you have some other items entered on this account 117-B, which is the bad check account or the note account and those are protest fees and interest?

A. In the balance of the warehouse account.

Q. The unpaid balance of the warehouse account? A. That's right.

Q. That is right. Now interest was interest on what, the 70 per cent advance?

A. The interest was figured — well, sure, the warehouse account was only 70 per cent of the total that was in there. Then we would take the high and

(Testimony of Mrs. Bea Swanson.)

the low for the month and get the average, divide it by two, and then figure it at six per cent.

Q. That is, the high and low of the average outstanding on the warehouse account which is number 117, is that right?

A. Yes, that is right. [456]

Q. Now does any one of those three accounts reflect any credit or contain any entry of credits for the \$28,000 note?

A. Well, this note account was credits against it. It wouldn't never——

Q. You mean for the payments that were received on the note? A. Yes.

Q. But the note itself was never entered as a credit on any of your three accounts, am I right?

A. No.

Q. I see.

The Court: Well, are you right or not? I don't know from that answer if you are or not, Mr. Jacobs. You say "Am I right" and she says "No." So I don't know.

Mr. Jacobs: Thank you, your Honor. I didn't realize the answer was ambiguous.

Q. Was I correct in stating that none of the three accounts contains any credit for the note as such, but they contain credit only for the payments that were received on the note, is that a correct statement?

A. The note is made up of those three returned checks, the balance on the warehouse, protest fees and the interest. That is the debit to the account

(Testimony of Mrs. Bea Swanson.)

which makes up the amount of the note. Any payments received on that was given credit for.

Q. Now, were the payments that were made on account of the note credited as against these bad checks? [457]

A. Well, not individually, no, because the total amount made up the note.

Q. I see. Now the bad checks made up a part of the total of the balance shown by the note account, did they? A. That's right.

Q. And does any one of these three accounts according to your records contain any credit of \$28,000.00 in one lump sum? A. No.

Q. Or of any figure near \$28,000.00?

A. No.

Q. In one lump sum. And there isn't any entry of credit as of the date of October 6th or October 8th or any date near that, near either of those dates for the execution of the note, am I right?

A. I don't know what you are asking me.

Q. Was the fact that the note had been executed ever entered on any one of those three accounts?

A. Well, that 117-B is the note, that is all the entry there is concerning it.

Q. I think that we ought to ask for the production of this 117-B. I don't want to disturb your records.

Mr. Shapro: We were going to offer it with the stipulation, if we may have it on the Court's approval, that a photostatic copy may be substituted for the original. [458]

(Testimony of Mrs. Bea Swanson.)

Mr. Jacobs: That is entirely agreeable.

Mr. Shapro: These are the original records of the Twin City Lumber Company.

Mr. Jacobs: I think the Court might wish to examine it in connection with these other two accounts.

Mr. Shapro: I have no objection, your Honor.

The Witness: Well, wait. Why don't—tell him—

The Court: What do these credits consist of?

The Witness: Payments on the note.

The Court: You have no mention of a note on that page at all, have you?

The Witness: It is marked "Notes Receivable".

The Court: That is at the top of the page?

The Witness: That is the——

The Court: Did you—there is no definite description of any particular note in any particular amount is there?

The Witness: Well, no, except that it is Pine Supply note——

The Court: Well, it doesn't say "Pine Supply note". I am talking about any entry here that is talked about, a promissory note, in any particular sum. It isn't there, is it?

The Witness: No.

The Court: You are later going to offer this?

Mr. Shapro: Yes. [459]

Mr. Jacobs: Q. Now, Mrs. Swanson, all of these checks, these bad checks that are entered on that so called note account, 117-B, were received were they not, prior to October 6th of 1953?

A. Yes.

(Testimony of Mrs. Bea Swanson.)

The Court: What is that again? I didn't get that.

(Record read.)

Mr. Jacobs: Q. And where are the three checks, the vouchers, the three check vouchers that are entered on that note account at the present time, if you know?

A. You mean the returned checks?

Q. Yes, the ones—they came back to you, did they not? A. Yes, they did.

Q. Where are they now?

A. Mr. Shapro has them.

Mr. Shapro: I have two of them, the other is already in evidence.

Mr. Jacobs: Am I right in saying, Mrs. Swanson, that so far as you know these three checks that you have entered there have never until this moment, or until this trial began, been handed back to the bankrupt or the plaintiff in this case?

A. That's right.

Mr. Jacobs: We will offer these two for completion of the record. I think we can make [460] one Exhibit out of them, your Honor.

Mr. Shapro: The first check is Exhibit 15, your Honor.

The Court: Make that Exhibit 15-A please.

(Thereupon the foregoing checks and notice of protest were entered as Plaintiff's Exhibit 15-A.)

Mr. Jacobs: Q. Are there any other records of financial dealings in your keeping, that is of finan-

(Testimony of Mrs. Bea Swanson.)

cial dealings between Twin City Company and George F. Elliff other than these three accounts you have referred to and other than the account with Abbott Lane Company?

Mr. Shapro: If your Honor please, I object to the question on the ground it assumes a fact not in evidence because this morning the witness testified there was an interest account, a fourth one.

The Court: The question is, are there. She can answer yes or no.

The Witness: A. Yes, there is an interest account.

Mr. Jacobs: Q. And this interest account is other and different, is it, from the note account that contains these entries of interest?

A. Yes.

Q. Will you show me the interest account that you have just referred to?

A. You are supposed to have that too. He made a copy of it.

Q. And this interest account I observe is numbered 117-A. [461] The total current balance of it appears to be \$127.34, is that correct?

A. It was until it was transferred over here. Here it is. (Indicating.)

Q. And that \$127.34 was transferred over and now appears on account number 117-B and now appears as the sixth entry on 117-B, is that correct?

A. That's right.

Q. Now what interest is included in account 117-A, interest on what?

(Testimony of Mrs. Bea Swanson.)

A. Well, that was the September interest on the warehouse account.

Q. That is to say upon the 70 per cent advances?

A. Well, it was on \$17,416.05.

Q. Now except by that transfer, 117-A, account 117-A was never closed, was it?

A. What was that?

Q. 117-A was never closed except by the transfer of this balance \$127.34 to account 117-B, am I correct about that?

A. That was the only entry on there that was left that was balanced out before September.

Q. I see.

A. He paid the August interest in July.

Q. I see. And except to the extent of payments received on the note account, 117-B has never been closed, has it? [462]

A. Yes, it has, as of now.

Q. What date was it closed?

A. January 1st, 1955, we formed a new partnership and transferred the assets and liabilities to the new partnership.

Q. In 1955? A. That's right.

Mr. Jacobs: Doesn't she mean 1954?

Mr. Shapro: I think she means '54.

Mr. Jacobs: Q. I don't want to confuse the record, Mrs. Swanson. Am I not right in saying what you really mean is 1954, wasn't that the date of forming the new partnership? A. No.

Q. January 1st, 1954?

A. I believe it's still 1955.

(Testimony of Mrs. Bea Swanson.)

Q. All right.

A. Wait, I will see if I can find something.

The Court: Let's move on to something else.

Mr. Jacobs: Yes, your Honor. I really wanted to cover that trivial detail.

Q. Now then, the warehouse account—I am moving on—— A. No, '54 is right.

Q. '54 is correct. The warehouse account was number 117, Mrs. Swanson, appears on your books, I take it, it is an account that is still current, it has not been closed? A. 117? [463]

Q. Yes. A. No, it's closed.

Q. And when was that done?

A. When the note was received.

Q. Is there any entry there showing that fact?

A. Sure, journal 15 credited that account, charged it over here in this note account.

Q. You have transferred the items then from 117 to 117-B, is that correct?

A. That's right.

Q. And that is the entry or the series of entries that you referred to as having closed 117, is that right? A. That's right.

Q. Very good. Mrs. Swanson, have you ever seen among the records in your charge a list of accounts receivable of Pine Supply Company, a written list of them? A. Of Pine Supply?

Q. Yes. A. No, I haven't.

Q. Have you ever seen among those records rolls of tape, adding tape, adding machine tape I should say? A. No.

(Testimony of Mrs. Bea Swanson.)

Mr. Jacobs: I think that is all.

Redirect Examination

Mr. Shapro: At this time if your Honor [464] please the defendants will offer in evidence ledger sheet 117-A, which is headed "Accrued Interest Pine Lumber Company" and sheet 117-B which is headed "Notes Receivable, Pine Supply Company."

The Court: They may be marked as one Exhibit, Exhibit K.

(Thereupon the foregoing ledger sheets were marked as Defendants' Exhibit K.)

Mr. Jacobs: If counsel wishes to substitute photostatic copies for them, we have no objection.

Mr. Shapro: Q. Miss Swanson, the entry on 117-B that balanced the account out on December 31st, 1954, journal 33, represented as I understand it a transfer of that receivable balance to the books of the new partnership, is that right?

A. That's right.

Mr. Shapro: That is all.

Recross Examination

Mr. Robert Jacobs: Q. Miss Swanson, you have discussed the status of George Elliff's account with Pine Supply Company. Can you tell me whether at any time during the dealings of Pine Supply Company with Twin City Company George Elliff's account was current?

A. Well, I wouldn't be able to tell you without looking at the ledger sheet; in May 1953.

(Testimony of Mrs. Bea Swanson.)

Q. In May 1953 his account was current. When in May was that, Miss Swanson?

A. Well, June 1st. [465]

Q. When in May was the account current? Did you testify that it was current in May, Miss Swanson?

A. Well, maybe I did. I will withdraw that.

Q. Was it ever current?

A. Well, it wasn't—no, I guess it wasn't.

Mr. Jacobs: Thank you, Miss Swanson.

Further Redirect Examination

Mr. Shapro: Q. Miss Swanson, will you point out to the Court on Plaintiff's Exhibit 13 which is account number 117 wherein Mr. Elliff was given credit for two of the three checks that were subsequently charged to the note account 117-B?

A. Do you want me to show——

Q. Show on account 117 where Mr. Elliff was given credit for the checks which after they bounced were charged against him on 117-B.

A. There's where he got the credit for them (indicating).

Q. The witness is pointing to the item, item 107398 under date of September 21st, 1953 on account 117. That is the amount of the first check which is Exhibit——

The Court: Well, Mr. Shapro, all three checks when they were received were credited to his account, weren't they?

The Witness: Yes.

(Testimony of Mrs. Bea Swanson.)

The Court: And later——

The Witness: Charged back. [466]

The Court: And when they were not honored they were charged back.

Mr. Shapro: They were charged back on a different account. I didn't want to leave the impression that they were charged twice.

The Court: Well, I didn't get that impression.

Mr. Shapro: No other questions.

The Court: That is all.

(Witness excused.)

Mr. Shapro: We will call Mr. Collins.

HOWARD COLLINS

called as a witness for the defendants, sworn.

The Court: State your name, please.

The Witness: Howard Collins.

Direct Examination

Mr. Shapro: Q. Mr. Collins, are you connected with Twin City Lumber Company?

A. That is right.

Q. And you were connected with Twin City Company, its predecessor, in 1953?

A. That is right, sir.

Q. And you know Mr. Elliff, the gentleman who testified previously in this case?

A. That is right, sir.

Q. And did you know him in 1953? [467]

A. Yes, sir.

Q. Did you know him in 1952? A. Yes, sir.

Q. Mr. Collins, do you recall—just answer this

(Testimony of Howard Collins.)

question yes or no—a meeting in the Fairmont Hotel in San Francisco in 1951 at which you and Mr. Hunter and Mr. Elliff were present?

A. I remember the meeting, sir, but—yes.

Q. Do you recall a meeting in the San Francisco office of Twin City Lumber Company in August of 1953 at which Mr. Hunter, Mr. Elliff and Mr. Baum were present, and you and Mr. Ramsay were in and out of the room?

A. Yes, sir.

Q. Do you recall a meeting in the office of Twin City Lumber Company in Los Angeles in the latter part of April or the first part of May of 1953 at which Mr. Elliff and Mr. Hunter and you were present?

A. There was a meeting, sir, but it wasn't at Mr. Hunter's office, at his home.

Q. It was at his home?

A. And it was, I think in the beginning of April or May, sometime in that time.

Q. Referring your attention to the meeting in 1951 at the Fairmont Hotel, was Mr. Elliff's financial condition discussed?

A. No, sir, it wasn't.

Q. With reference to the meeting in Mr. Hunter's home of [468] April or May of '53, was the financial condition of Mr. Elliff or Pine Supply discussed?

A. No, sir, other than Mr. Elliff was formerly interested in a sawmill by the name of the Coast Range Lumber Company and at that particular time we were just—mentioned Mr. Elliff, how his things come out with the Coast Range Lumber

(Testimony of Howard Collins.)

Company. He said "Well, things are working around all right."

He had pretty well washed his hands of it, as I recall.

Q. Now was that all that was said in your presence at the meeting in 1953, the latter part of April or May at Mr. Hunter's home concerning Mr. Elliff's financial condition?

A. That's all, sir, that I could recall.

Q. Now with reference to the meeting in 1953 in August at the office of Twin City in San Francisco, will you give the Court the substance of the conversation between the three of you to which you were a party and in which you were present only?

A. Well, Mr. Baum and Mr. Elliff were there and Mr. Baum at that time was taking care of the books for Mr. Elliff. He reassured us that everything with Pine Supply was going very well; there was a few of the accounts that were possibly a little slow, but there was nothing to worry about and business was, in their own words, "Very good."

Q. Do you recall any statement by Mr. Hunter at that meeting that unless something was done immediately that he [469] would have to close the account?

A. No, sir.

Q. Do you recall, Mr. Collins, a trip to Madera by automobile on Hallowe'en of 1952 with Mr. Elliff?

A. Yes, sir.

Q. Was anyone driving with the two of you?

A. Just the two of us.

Q. Just the two of you and you went to Madera

(Testimony of Howard Collins.)

and back in one day? A. That's right, sir.

Q. And the purpose of that trip was what?

A. Mr. Elliff had a lumber connection down there he thought we would be interested in, and since we shipped a lot of the lumber east, we weren't familiar with this mill, he suggested we go down to look over the mill.

Q. You talked all the way down and back?

A. Yes, sir.

Q. Was anything discussed between you and Mr. Elliff on the automobile trip to Madera concerning his financial condition?

A. The only thing that I can remember that was discussed was the Coast Range which got to be kind of a discussion every time we would meet, just like you, what time of the day it is or how it was, the weather today.

Q. What was said by you and him in substance concerning Coast Range on this automobile trip?

A. He had written it off to experience.

Q. Did he tell you the amount if any indebtedness of Coast Range for which he was responsible?

A. No, sir.

Q. Did he mention the percentage or proportion of any financial responsibility of his for the debts of Coast Range? A. Not whatsoever.

Q. Did he tell you in that conversation anything concerning his proposed business arrangement with Mr. Hodes, this is the automobile trip?

A. He may have discussed something on it but I have forgotten. At that time I believe he was

(Testimony of Howard Collins.)

working for Mr. Hodes and they planned on putting—setting up an organization whereby he would have a larger share in the participation.

Q. Did Mr. Elliff tell you on this trip to Madera that he was behind in payments on his home, and the Veterans Administration was going to foreclose? A. No, sir.

Mr. C. Huntington Jacobs: Objected to as leading and suggestive. This is the defendant's own witness.

Mr. Shapro: This is on the basis of a proposed categorical denial of the plaintiff's witness, your Honor.

Mr. Jacobs: That is just the purpose of the objection, your Honor. Can't we hear what was said without counsel testifying himself? [471]

The Court: I don't think this is a question for impeachment, is it, Mr. Shapro?

Mr. Shapro: No, your Honor.

The Court: If it was, you would be permitted to give the exact question and lead the witness. But I don't think it is. I think you would have to ask what was said at the conversation.

Q. (By Mr. Shapro): Mr. Collins, will you tell the Court what was said by you and by Mr. Elliff on this automobile trip concerning his financial condition?

A. Insofar as his financial condition, to the best of my recollection, the only thing that was discussed was Coast Range and that was just touched on briefly.

(Testimony of Howard Collins.)

And as I mentioned, Mr. Elliff had mentioned, he charged that up to experience, that was water under the bridge.

Q. And have you told the Court this afternoon all that you recall of the discussion had at the office of Twin City in San Francisco in August of 1953 concerning Elliff's financial condition?

A. That meeting was held during the course of our normal business and I was in and out of the conversation. As I recall, the pertinent information I have already testified to.

Q. And have you given the Court all of the conversation that you remember took place in Mr. Hunter's home in April or May of 1953 concerning Elliff's financial condition? [472]

A. That is right, sir.

Mr. Shapro: You may cross examine.

Cross Examination

Q. (By Mr. C. Huntington Jacobs): Do you know how long that meeting in August of 1953 that you have referred to lasted? A. No, I don't.

Q. Do you know how long all together you spent in attendance at that meeting?

A. I was there, I would say, the better part of several hours. But I was doing other business as well.

Q. So the meeting must have lasted several hours, right?

A. I would think so, strictly by memory.

(Testimony of Howard Collins.)

Q. Well now what was the subject matter of the discussion that lasted several hours, I mean, that was discussed for several hours?

A. I wasn't in on the conversations so I couldn't say.

Q. You didn't take any part in it?

A. That is right. I didn't take any part at all except right there when Mr. Baum and Mr. Elliff came.

Q. What was your connection with Twin City Company in 1952? A. I was a partner.

Q. At the time of this automobile trip, were you a partner in Twin City Company?

A. Can I withdraw that last statement?

Q. Why, of course, if it's in error. [473]

A. I wasn't a partner, but I was to be a partner.

Q. What was your present connection at that time?

A. I was an employee of Twin City Lumber Company.

Q. As what; what were you doing for them?

A. The buying and selling of lumber.

Q. Did you have anything to do with the extension of credit by them in connection with the sale or purchase of lumber, I mean, in connection with the sale of lumber? A. Yes, sir.

Q. Now, isn't it a fact that during that automobile trip, Mr. Elliff did tell you in answer to a question of yours that he was broke, didn't he say that?

A. No, sir, he did not.

Q. And did he not say that the Coast Range

(Testimony of Howard Collins.)

Lumber Company wound up, had left him flat, or words to that effect?

A. No, sir, he did not.

Q. Are you sure of that? A. That's right.

Q. Now what did you discuss during this automobile trip from San Francisco to Madera and return?

A. We discussed general things for the most part. I have forgotten them. They were generalities.

Q. You don't remember that conversation clearly enough to tell us what, if anything else, was discussed?

A. We talked about the number that was available, that we [474] had seen, talked about mutual friends.

Q. Did you talk about—you say you don't clearly recall whether you discussed the extension of credit by Twin City to this partnership that—this business that Mr. Elliff was to form with Mr. Hodes?

A. Mr. Elliff was aware of the terms.

Mr. Jacobs: I move that go out as the witness' conclusion.

The Court: It may go out.

Q. (By Mr. Jacobs): Did you or did you not discuss the extension of credit to this firm Abbott Lane?

A. To the best of my knowledge I don't think that was discussed.

Q. Did you not have a subsequent meeting with Mr. Hodes in the presence of Mr. Elliff?

(Testimony of Howard Collins.)

A. We saw Mr. Hodes that night. I had never met the gentleman and Mr. Elliff wanted me to meet him. We met him at his home.

Q. That was at San Jose, was it not?

A. Redwood City on the peninsula.

Q. I see. And that was upon your return from Madera? A. That is right, sir.

Q. And you did discuss with Mr. Hodes at that time, did you, the extension of credit to this firm in which Mr. Elliff was to be interested? [475]

A. To the best of my knowledge, the only thing that was discussed with Mr. Hodes, we expected people to discount their invoices. There was a cocktail party going on and we were late getting back.

Q. When did you first hear of Mr. Hodes?

A. Several months prior to the time that I met him officially.

Q. When did you first discuss with him the possibility of doing business with his firm?

A. I don't recall for sure. It was prior to the time certainly that we did any business with him.

Q. When did you first discuss that matter with Mr. Elliff?

A. I don't recall as to the date on that.

Q. Isn't it a fact that you did discuss with Mr. Elliff in the course of this automobile trip the possibility of Twin City Company extending credit to the firm that Mr. Elliff was intending to form with Mr. Hodes?

A. To the best of my knowledge I, being specific,

(Testimony of Howard Collins.)

I am sure that we wouldn't do something like that.

Q. You didn't discuss that at all with Mr. Elliff on that trip, is that your testimony?

A. To the best of my knowledge, it was not discussed.

Q. Then how did you happen to call on Mr. Hodes immediately upon the conclusion of the trip?

A. It was merely a courtesy call. Mr. Elliff wanted me to meet Mr. Hodes. They were interested in business. [476]

Q. It was first suggested by Mr. Elliff that you call on Mr. Hodes when the trip was finished?

A. That's right. As a matter of fact, I was expected and I didn't even know I was to be there.

Q. You say you were expected?

A. That is right. Apparently Mr. Elliff had told them that I was going to return with him.

Q. But he never said a word to you about it?

A. No, not on the trip. If we got back early enough we were going to go by there.

Q. So your call to Mr. Hodes was discussed during the course of the trip, is that right?

A. Yes. That was the time it was discussed, the first time I knew anything about it.

Q. During the trip? A. That is right.

Q. Was that going or coming?

A. I don't remember if it was going or coming.

Q. I see. Isn't it a fact that in the course of that discussion during the trip you said to Mr. Elliff that you might consider extending credit to Abbott Lane because it had a good credit rating, but you

(Testimony of Howard Collins.)

couldn't extend it on the faith of Mr. Elliff's responsibility? A. That was not discussed.

Q. That wasn't discussed at all? [477]

A. That's right.

Q. You didn't discuss Mr. Hodes' financial condition either?

A. I didn't know anything about Mr. Hodes financial condition other than the fact that he had been doing some business down there. I assumed through the source of information available to us through trade channels that he must be all right.

Q. At what time of day did this meeting in the Fairmont Hotel that you have testified to take place?

A. It took place in the morning about ten or eleven o'clock.

Q. You said that Mr. Hunter was there, you were there, and Mr. Elliff was there. Was anybody else there? A. Yes, sir, there were.

Q. Who else?

A. A man by the name of Sullivan, also there who was—had an interest in Coast Range Lumber Company, and a Mr. Pasquinelli was also there, Mr. Pasquinelli.

Q. Mr. Pasquinelli in the Fairmont Hotel in San Francisco? A. That is right.

Q. How long did that interview last?

A. We had breakfast—it wasn't an interview really—we had breakfast together and I—maybe an hour or an hour and a half.

Q. And what was discussed during that inter-

(Testimony of Howard Collins.)

view, during that meeting if you want to use that term? [478]

A. At that particular time, Coast Range was selling a certain amount of their production to the firm for which I was sales manager. We were interested in buying that lumber. It was critical at that particular time. They assured us if there was some way we could work out some kind of an arrangement whereby we could help them with their log deck they could give us additional production.

Q. Coast Range was heavily indebted to you—withdraw that.

Coast Range was indebted to Twin City Company at that time, was it?

A. No, sir. Twin City had nothing to do with it at that time.

Q. This was in 1951? A. Yes.

Q. Was there any discussion as to who made up Coast Range Lumber Company?

A. We were told who made up Coast Range Lumber Company, but I don't remember the names.

However, I was told that Mr. Sullivan was a member of Coast Range and also Mr. Pasquinelli had an interest in it as well as Mr. Elliff.

Q. And didn't they at that time say that they were backing it?

A. If they had an interest in it, I assumed they would be backing it.

Q. I see. Now when did you first know that Coast Range [479] Lumber Company dissolved?

(Testimony of Howard Collins.)

A. I don't know, sir, I don't remember. I have no reason to know.

Q. No. Weren't you at the time it dissolved—wasn't the firm for which you were working, wasn't it a creditor at that time?

A. A creditor of Coast Range?

Q. Yes.

A. I had left the employ of this particular firm and as far as I know they quit doing business with them after I left, terminated my employment.

Q. When did you terminate your employment?

A. In September of 1952, I believe.

Q. That was about the time you made this automobile trip with Mr. Elliff?

A. It was a year before, I am sorry, 1951.

Q. 1951. Now you speak of your employment. Did you mean your employment by Coast Range?

A. No. I was never employed by Coast Range.

Q. I see. You mean your employment by Twin City then? A. No. Brown's Trading Company.

Q. Was that a predecessor of Twin City Company?

A. That's right. Let's see, my dates are getting hazy. I am just a year—I am sorry.

Q. Correct them; go ahead. [480]

A. It was 1950 that I left Brown's and in 1951, in 1951 I was with Twin City.

Q. In 1950 there wasn't any Coast Range Lumber Company, was there?

A. '50—1951, I believe that—what do you want?

Q. I am just asking you whether there was any

(Testimony of Howard Collins.)

Twin—whether there was any Coast Range Lumber Company in 1950, if you know?

A. 1950, I don't know.

Q. You had never heard of it at that time?

A. As far as I know, I had not.

Q. Now then you were in the employ of Twin City as a buyer and seller of lumber for it?

A. That's right.

Q. At the time when Twin City—I mean at the time when Coast Range Lumber Company ceased business, weren't you?

A. I don't remember the date that Coast Range ceased business, the year.

Q. It was during 1952, wasn't it?

A. I don't know.

Q. I see. You didn't keep any track of that account at all?

A. There was no reason for me to keep track of that account.

Q. I am not asking you whether there was any reason for it, I am asking you if you did.

A. No, I didn't. [481]

Q. Now then, in April of 1953 in Los Angeles you attended a meeting in Mr. Hunter's house, I think you told Mr. Shapro, the meeting at which Mr. Elliff was present?

A. That's right.

Q. Along with Mr. Hunter. How long did that last?

A. Well, actually the business part of it probably didn't last very long, although Mr. Elliff was there most of the afternoon.

(Testimony of Howard Collins.)

Q. Weren't you present at all times during this discussion? A. No, I was not.

Q. You say that Mr. Elliff was present all afternoon?

A. He was swimming and it was just a nice day and it was just a nice social more than anything else.

Q. And you were not with Mr. Elliff and Mr. Hunter all of the time that Mr. Elliff was with Mr. Hunter, is that right? A. That's right.

Q. How long a time did you spend with them during that period?

A. Oh, probably an aggregate of a half hour, three quarters of an hour, and during that period many things other than business were discussed.

Q. I assume. And during the time that you were there some business was discussed, is that right? A. That's right.

Q. And this occurred in April of 1953? Now at that time Mr. [482] Elliff was in partnership with Mr. Hodes, was he not? At the time of this meeting?

A. I believe that was the case. I am not positive.

Q. Did the Twin City Company have an office in San Francisco at that time?

A. That is right, sir.

Q. And you were one of the two men in charge of that office, weren't you? A. That's right.

Q. Along with Mr. Ramsay?

A. That's right, sir.

(Testimony of Howard Collins.)

Q. And that was the situation also at the time of this automobile trip, wasn't it?

A. That is right, sir.

Q. Yes. Did you pay no attention to the dealings of Twin City Company with Mr. Elliff's partnership, that is, the Elliff-Hodes partnership?

A. As long as his accounts receivable were paid that is all we were interested in.

Q. May I have Exhibit 12?

I am showing you Plaintiff's Exhibit 12, which is a photostat of the Twin City Company's account, open account, with Abbott Lane Company. Have you ever scrutinized the Twin City account with Abbott Lane Company before?

A. We have—all we have access to actually is a weekly [483] statement which shows—it doesn't show this in aggregate, it just shows the current situation of our accounts receivable.

Q. Tell me whether Mr. Elliff's partnership—and I refer to the Elliff-Hodes partnership—whether his account with your company ever was current during the time that he was in partnership with Mr. Hodes under the name of Abbott Lane?

A. Well, I am not an accountant.

Q. Well, I am asking you the question, you can always say you don't know. But you don't know?

A. No, I don't.

The Court: How long did the Hodes-Elliff partnership exist?

The Witness: I don't know, sir.

Mr. Jacobs: I think the testimony has been, your

(Testimony of Howard Collins.)

Honor, that it started in November, the 1st and was wound up on the 20th or 28th.

Mr. Shapro: 20th of May.

Q. (By Mr. Jacobs): I know it was the 20th, I think Mr. Baum so testified.

Now during that period of time, did you not keep track of whether they owed you money and were paying it regularly?

A. We knew they owed us some money, but as long as they were paying on account——

Q. Regularly?

A. We have a number of accounts that do that.

Q. Weren't they frequently delinquent?

A. What do you mean by "delinquent?"

Q. I mean did they always pay when payment was due or did they not, as a matter fact, frequently fail to pay when due?

A. I don't know whether it was frequently or not. But I do know this, that we have a number of excellent accounts and we continue to sell them when their payments are past due.

Q. Didn't you keep track of that account?

A. Sure. We kept track of it as long as the money was coming in on it.

Q. Wasn't it coming in on this account to your satisfaction?

A. It was coming in on account, that is right.

Q. And you were satisfied with the experience of Abbott Lane, were you?

A. We thought perhaps they could come in

(Testimony of Howard Collins.)

faster, but that didn't mean that the account was bad.

Q. Did you make any investigation to discover why it wasn't coming in faster?

A. I didn't personally.

Q. You didn't personally. Was any made to your knowledge?

A. I don't remember. I think during the general course of business probably we asked Mr. Elliff how things were going along. If that is what you mean by an investigation, I think probably the answer would be yes. [485]

Q. Was that the only investigation that you know of that was made to discover why payments weren't coming in faster?

A. Mr. Ramsay made a trip down to San Jose sometime along about this period—but I don't remember the date—for the purpose of finding out how the money was coming along about the accounts receivable. But I don't know the dates.

Q. He didn't tell you anything about his conclusions?

A. Well, he certainly did tell me about the conclusions.

Q. What did he tell you?

A. That particular investigation revealed that the accounts were good. As a matter of fact, Mr. Baum told him——

Q. Wait a minute. Was this during April of '53 or was it during September?

A. I don't remember whether it was April or

(Testimony of Howard Collins.)

September. That was the only investigation that we had.

Q. Now the only conversation that you heard during this Los Angeles meeting at Mr. Hunter's house regarding Mr. Elliff's financial affairs, as I understand your testimony, the only conversation you heard that you can remember on that subject was a statement by Mr. Elliff that things were coming along all right, or words to that effect, is that correct?

A. No. He mentioned Coast Range, that came up.

Q. What did he say had happened to Coast Range?

A. He said that Coast Range, part of it he was going to charge up to experience, that he has sustained a loss in it: [486] but as far as, to the best of my knowledge is, no mention was made as to what extent that loss was.

Q. You mean the amount of the loss?

A. The amount of the loss.

Q. Is it your testimony that you heard him say nothing during the part of that interview, that when you were present you heard him say nothing regarding any indebtedness to his mother-in-law?

A. I didn't hear any conversation like that whatsoever.

Q. And am I correct in understanding your testimony to be that you were not in earshot of Mr. Hunter and Mr. Elliff except during a small part

(Testimony of Howard Collins.)

of Mr. Elliff's visit to Mr. Hunter which lasted all afternoon?

A. As I mentioned, that was a social meeting.

Q. Just a moment. Let's get an answer to that question. Except for that brief period, you were not within earshot of those two gentlemen, you didn't hear what they were talking about, am I right?

A. That is right, sir.

Q. Yes. Now if I interrupted any other answer of yours, well please proceed with it, and give it to us.

A. I haven't any statement—I got mixed up on years.

Q. Well, you are not entirely sure during what year this meeting at Mr. Hunter's house occurred?

A. Sure, that was 1953. [487]

Q. And are you quite sure that it occurred in April?

A. It occurred in the Spring, April or May.

Q. Or May? A. Yes.

Q. Do you remember the day of the week when it occurred?

A. I believe it was on a weekend; I believe it was on a Sunday.

Q. It was on Sunday, or is that your testimony?

A. I believe it was on Sunday.

Q. I see. Does Sunday, May 3rd appear to you to be about right?

A. That sounds about right, sir.

Mr. Jacobs: No other questions. That is all.

Mr. Shapro: No further questions.

(Testimony of Howard Collins.)

Mr. Robert Jacobs: No questions.

(Witness excused.)

The Court: We will take a recess.

(Recess.)

WILLIAM W. RAMSAY

a witness on behalf of the defendants, sworn.

Direct Examination

Q. (By Mr. Shapro): State your name, please?

A. William W. Ramsay, R-a-m-s-a-y.

Q. And what business are you now connected with?

A. I am in the lumber business, partner in Twin City Lumber [488] Company.

Q. And were you connected with Twin City Lumber Company or Twin City Company, its predecessor, in 1953?

A. I was.

Q. And continuously since?

A. Yes, sir.

Q. You know Mr. Elliff who testified here?

A. I do.

Q. Do you recall—and only answer this question yes or no, as the case may be—do you recall participating in a conference at the office of Twin City Company in San Francisco in the latter part of August, '53?

A. Yes, sir.

Q. Do you recall who was present at that conference?

A. I do.

Q. Who was, please?

A. Mr. Elliff, Mr. Baum, Mr. Hunter, Mr. Collins and myself.

(Testimony of William W. Ramsay.)

Q. Was the financial condition of Mr. Elliff discussed at that conference?

A. The financial condition of Mr. Elliff was discussed.

Q. Will you tell the Court please what was said by the parties to the conference as best as you can recall and all of it concerning the financial condition of Mr. Elliff?

A. I was in and out of the conference due to other business that was going on, Mr. Shapro. However, I was also in part of [489] it as well and heard some of the discussion which went on between Mr. Elliff, Mr. Baum and Mr. Hunter.

They were the three main participants therein. Mr. Baum and Mr. Elliff were reasserting the very thing that they had told you and all of us many times, that their business was in a sound condition, that their accounts receivable were slow, but that they were not worried, and that we had nothing to be worried about whatever.

They were seeking any possibility of any type of a new arrangement that might be made at that time, as well. I did not participate in that part of the discussion, however.

Q. In other words, after the subject of a new arrangement was mentioned, you were no longer in the room?

A. No, sir, I was not.

Q. And have you given the Court, Mr. Ramsay, the entire substance of the conversation to the extent in which you participated in it in the latter part of August of 1953 in the Twin City office, so

(Testimony of William W. Ramsay.)

far as it referred to the financial condition of Elliff?

A. Yes, sir, that is true.

Q. Now, do you recall a meeting in the latter part of September at the office of Pine Supply in San Jose? A. Very well, Mr. Shapro.

Q. During that week, the week in which this meeting took place, were you down there more than once? [490]

A. Yes, I was there, I think almost continuously every day that week. There might have been one day that I was not there, I don't recall, but I think every day that week.

Q. And on how many of those occasions was Mr. Baum present?

A. I believe that Mr. Baum was present at one time or another every day that I was there.

Q. Do you recall an evening during that week?

A. Yes. The first day that I was down there was on a Monday, and after refreshing my memory, I think it was September 28th, and we worked until seven or eight or nine o'clock at night that night.

Q. Who was there?

A. Mr. Elliff, Mr. Baum and myself.

Q. Will you tell the Court what was done and what was said substantially by each of you at that meeting?

A. We went through the records that were available at Pine Supply Company at that time. We checked all of the accounts receivable. I made in my own handwriting a worksheet on an accountant's tabulation form about so big (indicating).

(Testimony of William W. Ramsay.)

I listed all of the accounts receivable and their status as to the amounts they owed and how far they were behind. We ran a total off of those accounts receivable on a tape.

We have heard an awful lot about this disappearing tape——

Q. What happened, do you know? Do you know what happened to it? [491]

A. Yes, sir, I certainly do. I took both the worksheet and the tapes when I left that night and brought them back to our office. They remained in my possession in the office until after the note was signed. Then I disposed of them because they were of no further use to us or to me and I thought they were of no value.

Getting back to the other part of it, we ran a tape on the accounts receivable, we then went through his accounts payable and ran a tape on those. I believe it was the following day. Now it might have been earlier in that afternoon that we went out and actually made a physical check of the inventory in the warehouse. It could have been that same day, I don't remember for sure.

But at least we made a physical check of the inventory and totalled that.

I, of course, had the figure from our Los Angeles office as to what was remaining in the warehouse. So I knew what that was.

There were some other items in the warehouse which were not under the warehouse agreement. By that I mean Mr. Elliff's own physical warehouse.

(Testimony of William W. Ramsay.)

I cannot tell you at this time what the value of that was because I did not check his invoices from the suppliers that shipped that. But it was material that we had not shipped.

One of them I remember very specifically was some items [492] of moldings and the reason why I remember that very specifically was that it happened to come from a concern from whom we had formerly shipped molding to Mr. Elliff.

I was quite surprised to see material from one of our suppliers shipped direct to him. What the value of those moldings were, I don't know.

He had some door jambs in there that he had got someplace else. And where he has testified that there was only a few pieces of plywood, I didn't count them physically, but there was quite a large pile of plywood sitting on the floor. It was plywood which we had not shipped. He had purchased that from some other source.

As far as the accounts payable are concerned, I say we ran a tape on that. Now I am searching strictly from memory on this, Mr. Shapro, because I do not have those worksheets.

But I reported those figures to Mr. Hunter and also discussed them with Mr. Collins. To the best of my recollection there was roughly twenty-five to \$26,000.00 worth of material and inventory at the warehouse.

There was somewhere in the neighborhood of twenty-four to \$25,000.00 in accounts receivable.

There was something between eleven and \$12,-

(Testimony of William W. Ramsay.)

000.00 accounts payable on accounts other than Twin City Lumber Company. I would like to make one statement at this time if I may with reference to the accounts receivable. [493]

Mr. C. Huntington Jacobs: If your Honor please, may we have that testimony by question and answer?

The Court: Yes, please.

Q. (By Mr. Shapro): Mr. Ramsay, you have given the Court the figures from your recollection as to the total of accounts receivable and of inventory and also of the accounts payable other than your own.

How much did he, Elliff, owe Twin City at that time?

A. At that time it was \$28,116.00 and some odd cents.

Q. Have you given to the Court now the entire substance of what was said and have you told the Court all that was done by you, Mr. Elliff and Mr. Baum on this evening meeting at the end of September 1953 at the Pine Supply Office?

A. I think so, sir.

There was a discussion, a very brief discussion with reference to his other assets, which were the furniture and fixtures.

I think he had a truck and I believe there was a fork lift that he had. He had an equity in both the truck and the fork lift.

As I recall, those were on a conditional sales contract.

(Testimony of William W. Ramsay.)

I don't remember the figure of what we arrived at as the value of those other assets.

Q. Do you recall, Mr. Ramsay, any mention being made in this conversation concerning any particular accounts payable by name? [494]

A. No, sir, I do not.

Q. Now Mr. Ramsay, you recall, do you, a meeting with Mr. O'Connor's office in San Jose?

A. Yes, sir.

Q. And do you recall a meeting in Mr. Pasquini's office? A. Yes, sir.

Q. Both of those in the early part of October, '53? A. Yes, sir.

Q. Which was first in point of time?

A. Mr. O'Connor.

Q. And what is your best recollection as to the date of that meeting?

A. I believe that was on Tuesday, October 6th.

Q. And who was present?

A. Mr. Baum, Mr. Elliff, myself and Mr. O'Connor.

Q. And will you tell the Court from your recollection exactly what was said by the parties at that meeting, including yours?

A. My recollection of exactly what was said is rather hazy. I recall that I went up to Mr. Pasquini's office with Mr. Elliff and Mr. Baum to get the note drawn up that we had been discussing.

Mr. Pasquini for some reason or other was not available. It seems to me that he had left word with

(Testimony of William W. Ramsay.)

his stenographer that Mr. O'Connor could take care of it just as well. [495]

Now I don't know for sure, but at least we saw Mr. O'Connor. And as nearly as I can recall, Mr. Shapro, we explained to Mr. O'Connor briefly what was required, that we wanted a promissory note in conjunction with Mr. Elliff's business in the Pine Supply Company.

We discussed the terms of the note and the way in which the payments were to be carried out.

There was some discussion at that time as to what payments Mr. Elliff could or could not meet.

Mr. O'Connor asked some questions about the note and how to draw it up. Very frankly, that is all that I can remember with reference to that conversation.

Q. Was anything said about a trust agreement at that meeting?

A. Mr. Shapro, I can only say that I do not recall of any conversation with reference to a trust agreement at that time.

Q. Now, the meeting in Mr. Pasquinelli's office took place when?

A. I believe that was two days later, on Thursday October 8th, if I recall correctly.

Q. And who was present?

A. Mr. Baum, Mr. Elliff, myself and Mr. Pasquinelli.

Q. Will you give the Court the substance of what was said at that meeting by the various parties?

(Testimony of William W. Ramsay.)

A. We were interested in obtaining this promissory note from [496] Pine Supply Company with Mrs. Lannin's guarantee thereon. We had made—

Mr. Jacobs: Just a moment.

Q. (By Mr. Shapro): Is this what was said or not? You are supposed to be telling the Court what was said at this meeting.

A. I have a very hazy recollection of anything that was said at this meeting. I know that it has been testified before that a discussion was made of the trust agreement. I very frankly have no recollection of entering into a discussion of this trust agreement whatsoever.

I cannot deny that in my presence that if it were discussed that I would have voiced an opinion or put in my two cents worth.

But I do not remember participating or taking an active part in the discussion of this trust agreement whatsoever on that date.

Q. Why were you there at that meeting, I am referring to the meeting at Pasquinelli's office?

A. You mean at San Jose?

Q. San Jose, yes.

A. I went down to get the note.

Q. The note. The terms of this, as I understand your testimony, were discussed with Mr. O'Connor two days before?

A. Yes, sir, but— [497]

Q. But I mean the note wasn't delivered or shown to you on the date of the O'Connor meeting?

A. No. Mr. O'Connor only made some notes and

(Testimony of William W. Ramsay.)

a rough draft. And this, as I said, made the second time that I went down there to get the note.

I had been advised in conjunction with this note there was a trust agreement to be drawn up and when the trust agreement was obtained, we were to contact Mrs. Lannin.

Q. Who told you that? A. Mr. Elliff.

Q. When and where?

A. I cannot tell you exactly, but I believe it was on Monday October 5th, the day before the note was drawn up. Now it might have been the same day, I mean the same day that we saw Mr. O'Connor. But I couldn't swear to that.

Q. Mr. Ramsay, when did you first hear of a note by Mr. Elliff and a guarantee thereon by Mrs. Lannin?

A. Mr. Elliff called me at my home. Therefore, I believe it must have been on a Saturday morning, which would make it October 1st or October 2nd, 1953.

As I have already told you I had been down there most of that week, many discussions had gone on.

Mr. Elliff called me, and as nearly as I can recall his words, he said this: "Bill, we have been so close to the forest we haven't been able to see the trees. We have a very [498] easy solution to this whole matter. I have discussed it with—" he called her Pearl—"And she is agreeable to co-signing a note if you will accept the promissory note and turn over the warehouse receipts to her."

(Testimony of William W. Ramsay.)

Q. And what reply did you make, if any, to that?

A. I told him that I would immediately get in touch with Mr. Hunter and if it was agreeable with him, we would proceed on that basis.

Q. And what is the next thing that occurred in point of time thereafter, as far as you and Mr. Elliff were concerned?

A. Well, I believe then it was the following Monday that I called Mr. Hunter. I got him at his home, I believe.

I discussed the matter with him. I believe it was the following Monday, Mr. Shapro, the 5th of October.

Q. That you talked to Mr. Elliff about it?

A. Yes. I think I went to San Jose on that date, But I am not sure whether it was that date or the following day.

Q. Did you ever see the trust agreement, which is in evidence here as plaintiff's Exhibit No. 7?

A. I have not seen this trust agreement since this has all come up. I cannot deny definitely that I did not see this trust agreement prior to this time. I can only swear that as far as I know I do not recall having seen it.

Q. Now, Mr. Ramsay—

The Court: You mean you say you never saw that trust [499] agreement before this trial?

The Witness: As nearly as I can remember, your Honor, no, sir.

Q. (By Mr. Shapro): Mr. Ramsay, you had a

(Testimony of William W. Ramsay.)

meeting with Mr. Elliff and Mr. Baum at the Bermuda Palms restaurant in San Rafael?

A. Yes, sir.

Q. Do you remember when that was?

A. I think that was a Thursday night, October 8th.

Q. And was anyone but the three of you present at that meeting? A. No, sir.

Q. Did you receive any papers from Mr. Elliff or Mr. Baum at that time?

A. Did I receive any papers from them?

Q. Yes. A. No, sir.

Q. Did they hand you any papers to read?

A. Yes, they did.

Q. And who handed you what document, do you recall?

A. I honestly do not remember who it was that handed them to me. I presume it was Mr. Elliff.

Q. And what document was handed to you?

Mr. Jacobs: I object to his presumption your Honor. That is not testimony, if your Honor please. "I presume it [500] was Mr. Elliff," I move it go out.

Mr. Shapro: I have no objection.

The Court: Well, Mr. Baum and Mr. Elliff were present, weren't they?

Mr. Jacobs: Yes, sir.

The Court: Was it one of the two persons?

The Witness: Yes, sir, it was one of the two persons.

Q. (By Mr. Shapro): One of the two?

(Testimony of William W. Ramsay.)

Mr. Jacobs: Well——

Q. (By Mr. Shapro): And what document was handed to you at that time?

A. I know very definitely, Mr. Shapro, that the note was there at that time. Now, Mr. Elliff has testified that he also gave me a copy of the trust agreement. I can't recall having read that trust agreement, but I cannot positively deny it that I did not see it at that time. But I do not remember it.

Q. Did you receive a copy of it at that time to keep? A. No, sir, I did not receive one.

The Court: Weren't you interested, Mr. Ramsay, as to how the payments were to be made on this note?

The Witness: No, sir——

The Court: Not a bit. What were you there for, then?

The Witness: The payments on the note, your Honor, were set forth in the note. [501]

The Court: Weren't you interested as to how those payments were to be made?

The Witness: Mr. Elliff had assured us that he could meet the payments that were on the note.

The Court: Now, Mr. Ramsay, I am asking you some questions. They are important questions and I want you to answer them.

The Witness: Yes, sir.

The Court: If you don't want to answer them, don't answer them. But I am suggesting that you do.

(Testimony of William W. Ramsay.)

Weren't you interested in how these payments were to be made on this note?

The Witness: Yes, sir, I was interested.

The Court: Weren't you interested in the source from which the payments were to come?

The Witness: I knew the source from which the payments were to come, your Honor.

The Court: What was it?

The Witness: From the proceeds of the income of the business.

The Court: Well, as provided in the trust agreement?

The Witness: No, sir.

The Court: Well, where?

The Witness: Just in the normal course of the business, sir. [502]

The Court: Go ahead.

Q. (By Mr. Shapro): Mr. Ramsay, did you suggest at any time to Mr. Elliff or Mr. Baum the necessity of or the requirement for the trust agreement? A. I did not.

Q. In 1954 you, meaning Twin City, did not sell any merchandise to Mr. Elliff, did you?

A. Not as I recall we did not.

Q. Did you have any information at that time concerning his financial condition; did you receive it from any source? A. In 1954?

Q. Yes.

A. Well, the only information that we had—it was rather roundabout—the information to the effect that he had been securing stock. We knew about

(Testimony of William W. Ramsay.)

some stock that he had been buying from—we didn't know at that time the name of the firm—but from a relatively large plywood corporation on an open account.

Q. And you got that how, that information?

A. I frankly can't tell you exactly how we got that, Mr. Shapro. In our business we have people—people talk and you learn things through underground channels that occurred.

Q. Did you, Mr. Ramsay, at the meeting in Mr. Pasquinelli's office discuss with any one of the other three gentlemen present, namely, Mr. Pasquinelli, Mr. Elliff or Mr. Baum the subject of a necessity for a notice to be given creditors of [503] the trust agreement?

A. I recall that that subject came up. I believe it was Mr. Pasquinelli who brought it up. He mentioned under some legal code or something like that that should be done.

As far as I recall nothing else was discussed on this subject. I recall that. I do not recall that there was anything further in the way of discussion on the subject other than that matter.

The Court: Well, Pasquinelli said it should be done, what did you say?

The Witness: I didn't voice an opinion on it one way or the other.

The Court: Did anyone?

The Witness: I do not recall whether anyone said anything about it at all. I know that it was

(Testimony of William W. Ramsay.)

generally decided at that time that there would be no notice given to creditors.

Q. (By Mr. Shapro): You said it was generally decided, by whom?

A. By Mr. Pasquinelli, Mr. Baum and Mr. Elliff.

The Court: And not you, Mr. Ramsay?

The Witness: No, sir. I had no part in that discussion. I was not concerned in that discussion. Mrs. Lannin's guarantee on the note was all the evidence—all that we needed. [504]

Mr. Shapro: You may take the witness.

The Court: This witness is not particularly persuasive to me, if you want to save time.

Mr. C. Huntington Jacobs: Yes, your Honor. I will merely bring out one or two points.

Cross Examination

Q. (By Mr. C. Huntington Jacobs): Mr. Ramsay, you have told Mr. Shapro and the Court that you had no present recollection of ever having seen this trust agreement before this trial?

A. Yes, sir.

Q. Now you were examined under Section 21-A of the Bankruptcy Act by myself in the presence of Mr. Robert Jacobs and Mr. Ehrkenson before Referee Abrott in his office in Oakland, were you not?

A. Yes, sir.

Q. And you recall the circumstances?

A. Yes, sir.

Q. Did you not on that occasion give—were you

(Testimony of William W. Ramsay.)

not on this occasion asked the following questions and gave the following answers to them?

I have only one copy, Mr. Shapro.

“Q. Have you never seen the trust agreement that I have just been mentioning?

“A. Yes, sir, I have seen it.

“Q. When did you first see it? [505]

“A. Possibly within a day or so, after it was executed and I left the copy which we have in my hands, but I can say I do not recall the exact date.”

Q. Were you not asked those questions and did you not give those answers to them on that occasion?

A. If that is in the records, I must have said that, yes, sir.

Q. Do you remember now that you did see the trust agreement within a day or so after it was executed, don't you?

A. Mr. Jacobs, I still must say that I do not recall. I definitely have no recollection of it. I do not deny it that I did not see it.

Q. You mean by that, I take it, that you do not deny that you did see it, isn't that what you meant?

A. I deny that I did see it, but I do not recall it.

Q. You don't at this time have any recollection of the matter that was referred to in the testimony that I have just read?

A. The only time that could have been, Mr. Jacobs, would have been at the Bermuda Palms that night.

The Court: But you just testified a moment ago

(Testimony of William W. Ramsay.)

that you did not see the trust agreement at Bermuda Palms, didn't you?

The Witness: No, sir. I said I do not recall having [506] seen it.

Q. (By Mr. Jacobs): Did you take notes of the meeting that you have referred to in Mr. Pasquinelli's office. A. No, sir.

Q. You took no notes at all? A. No, sir.

Q. Did you take notes of the meeting that you have just referred to in Mr. O'Connor's office?

A. No, sir.

Q. Your answer is now you are positive to that effect, you are quite sure you did not?

A. As nearly as I can remember, yes, sir.

Q. I thought you told Mr. Shapro and the Court that your recollection was hazy as to what occurred at those meetings.

Now are you quite positive of what you are saying now, that you made no notes?

A. As far as I can recall, I made no notes, yes, sir.

Q. I have already reminded you of the occasion on which you gave testimony under Section 21-A before Judge Abrott.

Were you not on that same occasion asked these questions and did you not return these answers to them?

The Court: Page and line, please.

Mr. Jacobs: Page 13, your Honor, line 5.

“Q. Did you make any notes on the subject matter of any of these interviews that you had with

(Testimony of William W. Ramsay.)

these [507] people?"—referring to Mr. O'Connor and Mr. Pasquinelli.

"A. I did at the time—business notes, yes.

"Q. Have you still got them?"

"A. I do not."

Q. Didn't you so testify on that examination?

A. If that is in the records, Mr. Jacobs, I must have testified to that extent, yes, sir.

Q. Well now, don't you recall at the present time that you did make notes of these meetings that you had in Mr. O'Connor's office and Mr. Pasquinelli's?

A. Mr. Jacobs, I do not recall. I would have no reason to tell you differently if I didn't. I do not recall of having made any notes.

Q. You say that you kept these—I mean this worksheet of dated accounts receivable?

A. Yes, sir.

Q. And you kept them only until that note had been procured?

A. Yes, sir.

Q. And then you did what with them, destroyed them?

A. Yes, sir.

Q. And you destroyed at the same time the tapes that were taken on that occasion that you have mentioned?

A. That is correct. In fact, Mr. Jacobs, I believe if my memory is correct I destroyed them in the presence of Mr. Hunter. By "destroy them," I mean we threw them away. [508]

Q. When did you do that exactly?

A. It was subsequent, I know, to the time when

(Testimony of William W. Ramsay.)

this October transaction cleared, I suppose that is what you mean.

I believe that it was two or three weeks after that.

Q. And where were you then?

A. In San Francisco in our office.

Q. I see. And you had asked Mr. Hunter what you ought to do with them, did you, on that occasion, and he told you to destroy them?

A. Yes, sir.

Q. When you tell us that you found only eleven or twelve thousand dollars, records of only eleven or twelve thousand dollars of accounts payable, are you giving us a clear recollection or are you giving us a rough estimate?

The Court: I don't believe that was his testimony, Mr. Jacobs.

Mr. Jacobs: I had it on my notes. Maybe I am in error.

The Court: It was only eleven of the twelve thousand dollars of the accounts payable other than that owed to Twin City.

Q. (By Mr. Jacobs): That is what I really should have asked him. Thank you very much.

Other than Twin City? A. Yes, sir.

Q. Now are you giving us a clear recollection or is your [509] recollection hazy on that part also?

A. As nearly as I can recall that is correct. That is something that I actually wrote down and tabulated. I passed that information on to both other parties of our firm.

(Testimony of William W. Ramsay.)

Q. Did you ask any questions as to what other obligations Mr. Elliff owed at that time, if any?

A. No, sir, I did not.

Q. Did you ever on any of these occasions when you came to their place of business during that week, this series of some seven visits, six or seven I think you said, did you ever ask them for any information that they refused to give you?

A. No, sir.

Q. And did you ever ask them for any information that they refused to give you? Did you ever ask them to produce any records that they didn't produce? A. No, sir.

Q. Now did you on any other occasion than this last occasion when you sat down and compiled this list of receivables, did you on any other occasion than that during these six or seven visits examine the records of this concern?

A. I believe that that was the only time that we actually made a physical check of the records.

Q. The records were there on all other occasions, were they not?

A. They were, as far as I know, they were. [510]

Q. But you didn't examine them on any of these other occasions? A. No, sir.

Q. There were a great many of them, were there not?

A. I don't believe that there was too many, Mr. Jacobs. The records were available in this book form. They had little tabular sheets on them and the accounts payable were mainly invoices that

(Testimony of William W. Ramsay.)

were due and/or payable that were in a tub file at that time.

And we actually made a check of that plus a few that had been posted already. The records were not voluminous at that time at all.

Q. So that you could easily examine all of them?

Am I correct in understanding you you could easily examine all of them in the three hours on this last occasion that you devoted to that test?

A. It was quite a bit longer than three hours, Mr. Jacobs.

Q. How long do you think it really was?

A. I would say it was seven or eight. We began shortly after lunch and it carried on to seven or eight o'clock at night.

Q. To the best of your knowledge, did you examine all of their records during that seven or eight hours?

A. To the best of my knowledge, I did.

Mr. Jacobs: I think that is all I will ask of this witness. [511]

Mr. Shapro: No questions.

(Witness excused.)

JOHN W. HUNTER

a witness for the defendants, sworn.

Mr. C. Huntington Jacobs: May I interrupt long enough to say that I have just been handed a notation which has to do with those two certified copies that I promised to produce from the Referee's official records.

(Testimony of John W. Hunter.)

The purport of this is that he wants me to call him when he gets out today. Now he ordinarily adjourns, I believe, about 4:15 or thereabouts.

I take it that this is the only matter which would cause him to call me here in this trial, your Honor.

The Court: That is Mr. Abrott?

Mr. C. Huntington Jacobs: The essence of this is that we won't be able to produce them until tomorrow. That is clear from the notation.

The Court: All right.

Direct Examination

Q. (By Mr. Shapro): Will you state your name, please? A. John W. Hunter.

Q. And what is your connection with Twin City Lumber Company?

A. I am the executive manager.

Q. And were you the manager of its predecessor, the Twin City Company? [512]

A. I was a partner.

Q. Do you know Mr. Elliff?

A. Yes, I do.

Q. How long have you known him?

A. Well, for a number of years, either '50 or '51. I am not just sure.

Q. Did your company do business with Coast Range Lumber Company?

A. Our former company did, yes.

Q. You sold them merchandise?

A. No. We purchased lumber from Coast Range.

Q. You purchased lumber from Coast Range?

A. That is right.

(Testimony of John W. Hunter.)

Q. Was your company ever a creditor of Coast Range? A. Yes, it was.

Q. Were you paid in full?

A. We were paid in full.

Q. Do you recall a conference in the Fairmont Hotel in San Francisco in 1951 in which Mr. Elliff and Mr. Collins participated with you and also Mr. Sullivan, I believe?

A. I won't state the date, but I will state we did have a meeting with those people plus Mr. Louis Pasquinelli.

Q. Do you recall a meeting in your home in the latter part of April or first part of May of 1953 at which Mr. Elliff and Mr. Collins and you were present? [513]

A. Yes, and a man named John I. Grove was also there.

Q. John I. who? A. Grove.

Q. Grove, G-r-o-v-e? A. That is right.

Q. Do you recall a meeting at the office at the Twin City Lumber Company in San Francisco at which you, Mr. Baum, Mr. Elliff participated and Mr. Ramsay and Mr. Collins participated from time to time?

A. Yes. There was more than one of those meetings.

Q. There was more than one in August of 1953?

A. I don't know about August. I won't say what date the meetings were.

Q. (By the Court): Don't you recall a meeting in August of 1953 in San Francisco?

(Testimony of John W. Hunter.)

A. (By the Witness): Your Honor, I can't tell you the dates. I know that we had a meeting with Mr. Baum and George Elliff on two or three occasions.

Now it could very well have been August or one of those, but I can't state definitely the date.

Q. (By Mr. Shapro): During this period in 1953 and in 1954, who in Twin City Lumber Company was in charge of the extension of credit?

A. I was.

Q. And who during the same period was in charge of making [514] collections for Twin City Lumber Company? A. I am.

Q. You were at that time?

A. That's right.

Q. Now your company extended credit to Abbott Lane in 1952 and 1953, did it not?

A. Yes, it did.

Q. You know who Abbott Lane was?

A. I had never met Mr. Hodes, but I know that he was a trade name that they were supposed to be operating under.

Q. "They" meaning who?

A. Elliff, or Elliff and Hodes.

Q. Hodes. Can you tell the Court on what basis your company extended credit to Abbott Lane?

A. We talked to George Elliff about how they wanted to run—now, they paid their bills—where they discounted and so forth. I asked for a financial statement of Abbott Lane or Pine Supply and of Mr. Elliff himself.

(Testimony of John W. Hunter.)

Q. Did you get them?

A. Yes, I did.

Q. I show you, Mr. Hunter, Defendant's Exhibit E and Defendant's Exhibit I and ask you if those are the statements to which you have just referred in your testimony? A. Yes, they are.

Q. Now as I understand your testimony the basis upon which [515] or the bases upon which your company extended credit to Abbott Lane was your conversations with Elliff that you have told the Court about and those two financial statements?

Mr. C. Huntington Jacobs: That is leading and suggestive, if your Honor please.

The Court: I think it was; sustained.

Q. (By Mr. Shapro): Mr. Hunter, will you tell the Court on what basis or what bases your company extended credit to Abbott Lane?

A. Well, we knew George Elliff and he had kept his word with us in the past. I am quite a believer in going along with people who do what they say they will do.

Plus to substantiate that, we had this statement here of Pine Supply Company signed by Mr. Hodes and Mr. Elliff's signed by him. The combination of the three was our basis for extending them credit.

Q. Now, Mr. Hunter, referring your attention to the meeting in San Francisco at the Fairmont Hotel in 1951, was the financial condition of Mr. Elliff discussed? A. Absolutely no.

Q. Referring your attention to the meeting in your home in the latter part of April or the first

(Testimony of John W. Hunter.)

part of May of 1953, will you tell the Court the substance of the conversation in which you, Mr. Elliff, and Mr. Collins participated?

The Court: This is the meeting in Los Angeles?

Mr. Shapro: Yes, your Honor.

A. Well, the meeting was definitely on a Sunday because we met at the house. We discussed on just what George wanted from us. It was agreed that we would set up a warehouse and upon receipt of each invoice he would pay us thirty per cent of the invoice and we would set the other up in a warehouse account.

Also at that meeting I asked George—as a matter of fact, I am not too sure but what we didn't get these statements at that meeting, but I can't be positive of that—but I know I called to George's attention this amount of unlisted stocks he showed as an asset of \$9000.00 Coast Range.

Q. Are you referring to Defendant's Exhibit I?

A. That's right. And he said, "Well, I know John that that isn't worth that much."

And I said, "Well, George, as far as we are concerned it's not worth anything."

He said, "Well, I may get a little bit out of it."

And then another thing that I asked him about was the lot on Mount Hamilton Road in San Jose at the evaluation of \$5000.00—well, wait a minute, I don't know which one of the two—but I asked him about the value of the two lots and he said that they were certainly good.

(Testimony of John W. Hunter.)

So I know that this statement was in my hands at the time of this meeting. [517]

Q. And this statement again is Defendant's Exhibit I? A. That is correct.

Outside of the terms of how we were going to handle the warehouse and that he would use Douglas Guardian and not Lawrence, why, I would say that that was the extent of our conversation as far as business went.

We sat around and had a beer and so on and so forth and spent most of the afternoon.

Q. Was the subject of any of Mr. Elliff's indebtedness other than what might have been disclosed by that statement, Defendant's Exhibit I, discussed at that meeting?

A. Well, I asked George if this was a correct statement and he assured me that it was.

Q. Now you have testified as to the basis upon which your company extended credit to Abbott Lane.

Will you tell the Court on what basis or what bases you extended credit to Mr. Elliff after this meeting at the end of April or the beginning of May of 1953?

A. Well, on the same basis. As a matter of fact, when George called me and told me that Mr. Hodes was going to get out of the business, he said he was very happy about it due to the fact that since he got into this thing further with Hodes that he wasn't too happy with Mr. Hodes' reputation and thought it would hurt his business at Pine Supply

(Testimony of John W. Hunter.)

and that he just was very happy about it and now he was getting the breaks [518] and things that he needed. And that is what it was.

So we just used the same facts which we have here.

Q. Referring your attention, Mr. Hunter, to a meeting in the San Francisco office of Twin City Lumber Company, do you recall one taking place about August of 1953?

A. I am just sorry, Mr. Shapro, but I can't tell you the date. I know that we certainly had a meeting with those two fellows in that office, yes.

I know on at least one or two occasions there was a meeting with George Elliff in there.

Q. Do you recall a meeting in the San Francisco office at which Mr. Baum and Mr. Elliff and yourself were present and Mr. Ramsey and Mr. Collins were in and out?

A. Yes, I certainly do.

Q. Was there more than one like that in San Francisco?

A. I can't be positive that Mr. Baum was there on more than one. But I think he was there on two.

Q. Will you tell the Court what was said by the various parties in substance at the meeting at which you and Mr. Elliff and Mr. Baum conducted and the one at which Mr. Ramsey and Mr. Collins were in and out?

A. Yes. We had been trying to get an up-to-date current picture on what their business was doing. Mr. Elliff had called in Mr. Baum to take

(Testimony of John W. Hunter.)

off the trial balance and get up a statement and get a clear picture to present to us. [519]

Frankly it had gone on for weeks and we never got it. They came in as always to assure us that everything was all right, that Mr. Baum was having a little difficulty with the records because they hadn't been kept properly, but everthing was fine, and that some of their accounts were slow but all they needed was a good man to factor their interest, and they would be fine.

In fact—well, they told me that if they didn't make arrangements now—this was at one of these meetings, I can't be positive that it is the same meeting—but if they didn't make arrangements with these people, with the people they were dealing with now, that it was more satisfactory that they were going to change to another factory.

If they didn't do that, make better arrangements to get their accounts receivable factored, that they were going to take them to another man to take care of their business.

Q. (By the Court): What do you mean by "factor"?

A. (By the Witness): Well, your Honor, you take an accounts receivable invoice that you have invoiced your customer and you go to the banks and the banks normally advance you sixty to sixty-five per cent on that account receivable.

Q. (By the Court): Sometimes they will be higher and sometimes not that much?

A. (By the Witness): And sometimes they will

(Testimony of John W. Hunter.)

take them with recourse. In other words, if they don't collect them they [520] will be back on them, demand them, the invoicing.

Sometimes they will take them without recourse. And in addition to banks, there are a lot of private individuals who do that same thing that Elliff was doing with a private individual here in San Francisco.

Q. (By Mr. Shapro): Now at the meeting that you have just related the substance of, was any new plan of financing, other than the possibility of increasing the factoring discussed?

A. No. On a couple of occasions, George asked me if we would be interested in factoring his accounts receivable.

I said, "George, no, we wouldn't."

We weren't in that type of business and we didn't have time for it and that we wouldn't be interested.

That was the only thing new that was discussed at that meeting.

Q. Did Mr. Elliff at any time within your recollection tell you anything concerning his personal indebtedness other than what is indicated by the statement that you have in your hand, Defendant's Exhibit I?

A. Absolutely no unless that you count way back when I saw George occasionally at San Jose when he was down seeing Ben Clement and we used to talk about Coast Range and asked him how it was coming out.

George said, "It's all water under the bridge. I

(Testimony of John W. Hunter.)

have [521] got it all beat but it cost me some money.”

Q. You say “way back,” can you put a year on that?

A. Well, it was prior to when we went into this agreement with George.

Q. Was it before May of '53?

A. Yes, yes.

Q. Did you, Mr. Hunter, suggest to Mr. Elliff at any time Mrs. Lannin as a possible guarantor of his obligations?

A. Absolutely no.

Q. In the latter part of September of 1953 you had several telephone conversations with Mr. Elliff, did you not?

A. I have had several, but now again I hate to tie it down.

Q. Well, the evidence before the Court shows that it was during that month that either two or three of his checks bounced?

A. I will say yes, that was the month, yes, that's right.

Q. Will you tell the Court the substance of those telephone conversations, both what you said and he said as far as you recall?

A. That is a very hard question for this reason, that I just don't like to be positive. But I know that conversation must have been that George would have to pay us and pay us as he agreed to pay us.

I will make the statement——

(Testimony of John W. Hunter.)

Mr. Jacobs: I am going to interrupt, if I may, to his testimony. [522]

The witness says "He knows it must have been," so and so, but he can't recall exactly. Can't we have his recollection instead of his inference?

The Court: I think that is correct. I think you should give your recollection of the substance of the conversation or conversations that you had with him.

A. (By the Witness): My recollection then, your Honor, was that I told George that these checks had been returned and that it wasn't right, that he had promised to pay us and we wanted him to pay us.

And whether it was right at this time or not, I don't know. But I know in one case George told me that one of the checks that was returned was due to the fact that one of the checks that he had gotten from his customers had been refused at the bank and that consequently sent our check back.

Q. (By the Court): Well you were considerably agitated at that time about these bad checks, weren't you?

A. (By the Witness): In September?

Q. (By the Court): Yes.

A. (By the Witness): Very agitated.

Q. (By the Court): And you were trying to get him to pay?

A. (By the Witness): That is correct, without qualification.

(Testimony of John W. Hunter.)

Q. (By the Court): You were pretty positive about it, weren't you?

A. (By the Witness): Yes, sir. [523]

The Court: All right.

Q. (By Mr. Shapro): Mr. Hunter, I show you Defendant's Exhibit F which has been received in evidence. Will you look at that please?

A. I know the letter.

Q. You know the letter. You will notice on the face of it in a handwriting other than the handwriting of the body of the letter the date February 3rd, 1954, written.

In whose handwriting is that, if you know?

A. That is mine.

Q. And what does the date represent?

A. I asked myself the same question when I found this letter in a file that I had entitled "Pine Supply" in a drawer halfway buried.

The only thing I could tell myself then and I answer to the Court now is that that was the date that I got this letter.

Q. (By the Court): Where did you get it?

A. (By the Witness): It was in a Pine Supply folder that I had some Pine Supply stuff.

As a matter of fact, your Honor, those checks, those three checks that have been brought up here were there.

Q. (By the Court): That didn't come in the mail you don't mean?

A. (By the Witness): Oh, yes—no, I didn't un-

(Testimony of John W. Hunter.)

derstand your [524] question. I thought you said—I thought you meant where did I get it.

When I found it it wasn't in the regular Pine Supply folder is what I am trying to say, correspondence file. But it came through the mail, yes, sir.

Do I make myself clear to you now?

Q. (By the Court): Well, I don't know. You said you found it in a folder, as I understand?

Q. (By Mr. Shapro): That is recently, you say?

Q. (By the Court): Now you said it came in the mail, where did you find it?

A. (By the Witness): Your Honor, it was mailed to us by someone. I don't know who, I assume it was by George Elliff. Instead of—and I received it, I believe, back in February 3rd, '54—but instead of having it filed, instead of it being filed in the correspondence file with Pine Supply, it was in a folder which I found in my desk here when I made a complete search here last week or so to get the last scrap of anything we might have had concerning this case.

Q. (By the Court): Then you found it recently. Do you recall now whether it originally came in the mail when you first got it or did it come to some other place?

A. (By the Witness): Yes, I am sure it did, it came in the mail.

Q. (By the Court): To you at Los Angeles?

A. (By the Witness): It would have come to the office.

(Testimony of John W. Hunter.)

Q. (By the Court): Or up here?

A. (By the Witness): No, in Los Angeles.

Q. (By the Court): I want you to reconstruct what might have happened. I want to get your memory of it.

A. (By the Witness): Well, your Honor, I got this letter, and I can remember it just as well as well can be.

Q. (By the Court): Let me see that letter again.

Well, do you recall getting it shortly after you had a conversation on the telephone with Mr. Elliff in which there were some harsh words spoken?

A. (By the Witness): Yes, sir, I do.

Q. (By the Court): Well, did you get the letter shortly after that?

A. (By the Witness): Yes.

The Court: All right.

Q. (By Mr. Shapro): Mr. Hunter, I show you Defendant's Exhibit J which is a financial statement of Pearl K. Lannin and ask you if you can recall when that was received by you?

A. I am not positive, but I believe that I received this when I got the note.

Q. And do you recall when you got the note?

A. The note, to the best of my recollection, was delivered to my home by Mr. Elliff.

Q. And your best recollection is that the financial statement [526] in question came with it?

A. That is right.

Q. (By the Court): Didn't you have some in-

(Testimony of John W. Hunter.)

formation about Mrs. Lannin prior to the time you took the note?

A. (By the Witness): Yes, sir, I certainly did.

Q. (By the Court): You weren't relying on this financial statement, were you, but you didn't have one?

A. (By the Witness): No. May I tell you what I did rely on?

The Court: Yes.

A. (By the Witness): All right. I knew Mr. Louis Pasquinelli, knew his reputation, being a member of the board and highly respected in his community.

Mr. Pasquinelli assured me over the telephone that Mrs. Lannin was good for a considerable amount of money, more than the amount of the note that we were talking about.

That was good enough for me.

The Court: All right.

Q. (By Mr. Shapro): Mr. Hunter, did you release the warehouse to Mr. Elliff or Mrs. Lannin before or after your receipt of that financial statement, if you can recall?

A. Well, gee, I am not sure. I think it was after but I don't know.

Q. You are not sure?

A. I am not sure, no. I am pretty sure we wouldn't. The only reason I am pretty sure we wouldn't release it until we [527] got this—but to tell you positively, I can't.

Q. Mr. Hunter, I show you Plaintiff's Exhibit

(Testimony of John W. Hunter.)

7 in this case which is the trust agreement about which we have heard considerable in this case, and ask you whether or not first you ever saw that prior to the time this litigation commenced?

A. I did not.

Q. Did you see a copy of it?

A. I did not.

Q. Did you receive along with the financial statement of Mrs. Lannin——

A. I want to qualify that. I say I did not. I certainly don't have any recollection of that. I don't think I did and I certainly can't remember.

Q. Do you know whether or not it was enclosed or a copy of it was enclosed with the financial statement of Mrs. Lannin and the \$28,000.00 note?

A. I will say that it certainly was not.

Q. (By the Court): Didn't you know that there was a trust agreement being executed, whether or not you saw it?

A. (By the Witness): Yes, I did.

Q. (By the Court): You knew the terms of it, didn't you, that Mr. Pasquinelli was going to be the trustee and would handle the money?

A. (By the Witness): That is right, sir.

Q. (By the Court): You knew about that?

A. (By the Witness): Yes, sir.

Q. (By the Court): And payments were to be paid to Pasquinelli and by him out of such monies that might be received?

A. (By the Witness): Your Honor, I knew

(Testimony of John W. Hunter.)

about that, but whether I knew about it before we got the note or after, I don't know.

The only reason that we made this deal was that Mr. Pasquinelli said Mrs. Lannin had more than \$28,000.00. That is all I cared about.

Now that is the truth of the matter.

Q. (By the Court): But you did know that there had been a trust agreement discussed and that there was one in existence, and that Mr. Pasquinelli was to be the trustee?

A. (By the Witness): Yes, sir. But I don't know whether I learned that before we got the note or right after. It was all right in that close period of time.

But I can't truthfully tell you if it was right before or just after or just when it was.

Mr. Shapro: You may cross examine.

The Court: Do you want to get Mr. Abrott at 4:15? You can't finish with this witness today.

Mr. Jacobs: No, it is impossible.

The Court: All right. Now how do we stand on time?

Mr. Shapro: I think when the subject of such rebuttal as the plaintiff may have when this witness is finished, the [529] defendants will be through.

Mr. Jacobs: I can say that there will be mighty little, if any, rebuttal.

The Court: In other words we will finish tomorrow morning.

Mr. Shapro: Maybe tomorrow morning.

Mr. Jacobs: We can argue this case and complete it with the argument tomorrow, I think, without any doubt if your Honor is willing to hear argument.

The Court: All right then. Until tomorrow morning at ten o'clock.

(Thereupon this hearing was adjourned until 10:00 o'clock a.m. of Tuesday, November 29, 1955.) [530]

Tuesday, November 29, 1955

10:00 A.M.

Mr. C. H. Jacobs: I now have the exhibits that I mentioned yesterday, if your Honor please, and they, each of these in this group of copies of the Referee's Register is separately certified.

The Court: Is what?

Mr. C. H. Jacobs: Is separately certified.

The Court: All right.

Mr. C. H. Jacobs: So that I will simply offer them as plaintiff's next in order.

The Court: All right. Exhibit 20.

(Whereupon the group of minute book entries in matter Bankrupt No. 43322, George F. Elliff, received in evidence and marked Plaintiff's Exhibit No. 20.)

Mr. C. H. Jacobs: I might mention to the Court that I—I call the Court's attention to the fact that they show only 12 hearings here in this District. The hearings, as your Honor will observe, in several instances, concluded in both examinations and proceedings relevant to the Lannin claim, so that

I was required to attend here in this District on only 12 occasions where I thought that I attended on 14. These do not naturally cover the Los Angeles hearings.

Now, in this list of claims, which I have also [531A] received certified by Judge Abrott, I find an error in respect of the claim of Pearl K. Lannin, which I have examined and which is actually in amount approximating 16,000 odd hundred dollars.

Mr. Shapro: It should be \$16,784.98.

Mr. C. H. Jacobs: \$16,784.98. I think we can stipulate to that.

Mr. Shapro: Yes. It is a typographical error, your Honor.

Mr. C. H. Jacobs: We will offer it subject to that correction.

The Court: That is a list of claims?

Mr. C. H. Jacobs: Yes, your Honor.

The Court: Exhibit 21.

(List of claims received in evidence and marked Plaintiff's No. 21.)

The Court: While we are on the question of claims, not being familiar with bankruptcy procedure as you gentlemen are, you say that the time expired normally for filing of claim by Twin City but there was some possibility of that being extended. To what were you referring?

Mr. C. H. Jacobs: It has reference to the same section that Mr. Shapro mentioned.

Mr. Shapro: 57(n).

Mr. C. H. Jacobs: 57(n). [532]

Mr. Shapro: May I read it to your Honor?

The Court: Yes.

Mr. Shapro (Reading):

“Except as otherwise provided in this title, all claims provable under this title, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: provided, however, that the Court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or subdivision thereof: provided further that, except in proceedings under Chapters 10, 11, 12 and 13 of this title, the right of infants and insane persons without guardians, without notice of the bankruptcy proceedings, may continue six months longer.”

Then this is the part that comes in:

“And provided further that a claim arising in favor of a person by reason of the recovery by the trustee from such person of money or property, [533] or the avoidance by the trustee of a lien held by such person, may be filed with 30 days from the date of such recovery or avoidance, but if the recovery is by way of a proceeding in which a final judgment has been entered, against such person, the claim shall not be allowed if the money is not paid or the property is not delivered to the trustee within 30 days from the date of the rendering of

such final judgment, or within such further time as the Court may allow.”

That is the provision to which we were addressing ourselves as an exception.

The Court: In this proceeding, if there was a recovery against Twin City or setting aside——

Mr. C. H. Jacobs: Setting aside——

Mr. Shapro: Under that section, I would say to your Honor, that it would appear—I mean it appears to me that if there were recovery in this action in favor of the trustee on a money basis, that the Twin City would still be in a position within 30 days of the judgment becoming final, and if the judgment were paid within 30 days, to file a claim for it.

The Court: I see.

Mr. C. H. Jacobs: That is, if your Honor found they had any claim against the bankrupt at all on this note. [534]

The Court: I see.

Mrs. C. H. Jacobs: Which is a matter that we will cover in our argument.

The Court: Very well.

JOHN W. HUNTER

resumed, previously sworn.

Cross Examination

Q. (By Mr. C. H. Jacobs): Mr. Ramsay, you told us yesterday that in a conversation with Mr. Elliff, which took place, I believe, on May the 3rd of 1954——

(Testimony of John W. Hunter.)

Mr. Shapro: '53.

Q. (By Mr. C. H. Jacobs): —of 1953—thank you, Mr. Shapro—the matter of his real property on Mount Hamilton was discussed. Am I right about that?

The Witness: Your Honor, my name is Hunter. I don't know whether he wants to ask Ramsay.

Q. (By Mr. C. H. Jacobs): Mr. Hunter—I beg your pardon. Thank you.

A. I looked at the statement and started to mention one of those two pieces of property by name, and then I corrected myself and said we discussed the property but I couldn't be positive just which piece it was. We discussed his property values and he said he thought they were worth that much or more. That was my statement.

Q. Now, you asked him at that time, I assume, whether he [535] owned that property free and clear of liens, did you not?

A. I would certainly think I did, Mr. Jacobs.

Q. Didn't he tell you that it was encumbered?

A. If I asked him, he certainly didn't, because the only thing that we discussed—we discussed the statement and I made the statement to the effect that I didn't think there was any value—the \$9,000.00 asset—I believe it was \$9,000.00—it shows in that statement—of his Coast Range stock.

Q. Mr. Hunter, you say that you are certain he didn't if you asked him. You imply you are not certain whether you asked him or not. Can you

(Testimony of John W. Hunter.)

search your memory and give us the positive answer to that?

A. Mr. Jacobs, from that period of time I was positive as anyone can be. I would say that—I mean, I know that I asked him about those values on that statement, yes, sir.

Q. Now, did you make any investigation to discover whether there were liens of record against that property? A. No, sir, I did not.

Q. Not at all? A. None at all.

Q. You didn't cause Mr. Ramsay or Mr. Collins or anybody else to look at the official records of Santa Clara County? A. No, sir, I did not.

Q. Are you quite positive that Mr. Elliff did not tell you [536] in that connection that this property was encumbered by a trust deed in favor of his mother-in-law, Mrs. Lannin?

A. Mr. Jacobs, I am very positive that he did not tell me that.

Q. And you are equally positive that he told you it wasn't encumbered at all—was that your testimony? A. Yes, it is, sir.

Q. Now, all of this grew out of this financial statement that you have referred to—this conversation about this Mount Hamilton property—I mean, you are positive now that you had the financial statement before you at the time you conducted this conversation with Mr. Elliff?

A. Regarding this Mount Hamilton property?

Q. Yes. A. Yes, I am, sir.

Q. When you had your conversation with Mr.

(Testimony of John W. Hunter.)

Pasquinelli regarding the responsibility of Mrs. Lannin, you say you had that conversation with him by telephone? A. That's right, sir.

Q. And you can't remember the date of the conversation? A. That's right, sir.

Q. Can you remember whether it was before or after October the 6th, 1953?

A. No, I can't, but it was in a few days one way or the other. I am sure that it was before we signed the warehouse releases. [537]

Q. You don't recall whether it may have been after October the 8th, 1953?

A. I just answered you, Mr. Jacobs, that I am not sure whether it was just before or just after. I know it was before we signed the warehouse releases. I signed them, I am sure of that, Mr. Jacobs.

The Court: When did you sign those? Did they have any date on them? Do you have them here?

Mr. Shapro: Yes, I have them.

The Witness: I can——

Mr. Shapro: May I show this to the witness?

The Court: Yes. Show it to counsel.

(Counsel examining.)

Q. (By Mr. C. H. Jacobs): Are those documents that Mr. Shapro just handed you, the warehouse releases that you just referred to?

A. Yes, sir.

Q. Now, they don't show, do they, the date on which you personally signed them?

A. I don't know that they do. No. In other words, I don't know whether this date—actually, I

(Testimony of John W. Hunter.)

don't know whether this date is whether Mr. Elliff signed them or whether I signed them. I know that I signed them while I was in San Francisco in the Douglass-Guardian warehouse office. [538]

Q. In the Douglass-Guardian warehouse office. Do you recall the date when you went there?

A. No, I don't, but it was shortly after we got the note, because I know I turned the note over to the Canadian Bank of Commerce.

Q. You got the note from Mr. Elliff, did you not, about the 10th of October, or shortly after——

Mr. Shapro: 11th.

Q. (By Mr. C. H. Jacobs): The 11th, or thereabouts? A. Yes, sir.

Q. So that it would have been after the 11th that you went to San Francisco. Did you go the next day, or how long after that did you go?

A. It was right shortly after that. Mr. Jacobs, because there is a letter here that I wrote from San Francisco with a memo No. 58 to Miss Swanson, returning our copies of these releases.

Q. Now, did you return those copies on the same day on which you signed the originals?

A. I couldn't be positive of that, Mr. Jacobs. I wouldn't say.

Q. Either the next day or the——

A. I wouldn't be positive of that. Certainly within a few days. It could have been the same day.

Q. We can safely say then that you signed the releases on [539] or about the 14th, can we?

(Testimony of John W. Hunter.)

A. I would say give or take a day or two one way or the other.

Q. Of October.

The Court: Why do you say the 14th?

Mr. C. H. Jacobs: Because—I say the 14th because that is the date prior to the date that this memorandum that he sent down to his—to Miss Swanson in Los Angeles——

The Court: The memorandum was dated the 15th.

Mr. C. H. Jacobs: Yes, sir.

Mr. Shapro: Yes, sir.

Q. (By Mr. C. H. Jacobs): Now, does that clarify your memory as to when you had this telephone conversation with Mr. Pasquinelli?

A. No, sir, not any more than it did before.

Q. As a matter of fact, Mr. Hunter, didn't you get your information regarding Mrs. Lannin's responsibility from Mr. Ramsay?

A. I got it from both sources, Mr. Jacobs.

Q. Well, what two sources do you refer to now in that answer?

A. From Mr. Ramsay and from Mr. Pasquinelli.

Q. Did you get it from any other source?

A. No, sir.

Q. So you didn't pay attention to the statement [540] of Mrs. Lannin's—that is, the financial statement of Mrs. Lannin—at all; is that your testimony?

(Testimony of John W. Hunter.)

A. No; no, it certainly is not. May I digress?

The Court: If you want to explain your answer, you may.

A. Yes, sir. When Mr. Ramsay called me and told that Mr. Elliff had made the proposition to get his mother-in-law, Mrs. Lannin, to take care of these notes, and asked if it was all right to take care of the warehouse receipts on the open account—asked me if it was all right—I said, “Yes, if Mrs. Lannin’s statement is all right, and if her financial worth is all right,” and I had heard that it was. To what extent, I had no knowledge at that time, except hearsay. Later, between the date Mr. Ramsay called me and the time that I signed the warehouse releases, I talked to Mr. Pasquinelli, and he told me that Mrs. Lannin was certainly financially responsible and a woman of considerable means.

In addition to that, I feel—well, I know because I rechecked my memory last night, to be honest about it—that Mr. Ramsay went to the Bank of America. He said the man he talked to, Mr.—was Mr. Young——

Q. (By Mr. C. H. Jacobs): Now you are giving us something that Mr. Ramsey told you he did, are you?

A. Well, I know at the time that we had that information and I am sure, if you will read that testimony, I mentioned [541] that I thought we had talked to the bank, in that deposition, and then when Mr. Elliff brought the note down, he had Mrs.

(Testimony of John W. Hunter.)

Lannin's statement and I looked at Mrs. Lannin's statement——

Q. Well, now—— A. And that——

Q. We know that you got this information from Mr. Ramsay prior to October 6, when the note was dated, is that right?

A. No, sir, I didn't say that. I can't tell you just exactly whether it was a day or two before the note was actually signed or the date. I will say that all our information, the note, Mrs. Lannin's statement, Mr. Ramsey's statements to me, were all given to me to satisfy me that Mrs. Lannin's guarantee was good before I signed the releases in the Douglass-Guarandian warehouse office.

Q. I see. But you can't give us the order in which you got this information?

A. No, sir, I can't.

Q. You may have got the information from Mr. Pasquinelli after you had received the financial statement from Mr. Elliff?

A. I would doubt that, Mr. Jacobs, but it is possible.

Q. You may have got it even—the information, from Mr. Ramsay, that you referred to, subsequent to receiving the financial statement?

A. That's possible, yes. [542]

The Court: Well, now, what do you mean by that, got the information? What information from Mr. Ramsay? What information could you get after you got the financial statement?

A. Your Honor, you are asking me that?

(Testimony of John W. Hunter.)

The Court: I am asking you, yes.

A. Yes. I didn't know you were talking to me. I didn't know. I thought you were talking to Mr. Jacobs, sorry.

We could have gone to the bank and verified it, your Honor, is what I had in mind, could have gone to the bank. I don't think we did. I think I got that information before. The only thing I will say I am positive of, and I say it without qualification, that before we signed the warehouses releases—I signed it personally—that we had this information before us. That is just prudent business.

Q. (By Mr. C. H. Jacobs): When did Mr. Ramsay report to you that the note had been executed? Did he ever do so?

A. Well, I am sure he did, but I couldn't tell you the date.

Q. Was it before you received the note from Mr. Elliff?

A. I would certainly think it was, but I couldn't tell you for sure.

Q. Didn't he at that time give you the report that you have referred to about his investigation of Mrs. Lannin's condition? [543]

A. I would certainly think he did, Mr. Jacobs, yes.

Q. And didn't he at that time report the entire transaction to you, everything that had happened in regard to this transaction?

A. I would certainly think he did. If you have

(Testimony of John W. Hunter.)

reference—there was a trust agreement—I would think he probably did. I wouldn't say yes or no. I will say, without qualification, that the main thing we were interested in was the note.

Q. That isn't what I asked you, Mr. Hunter.

A. I am sorry.

Q. I asked you whether he didn't report the entire transaction to you before you ever received these documents from Mr. Elliff.

Mr. Shapro: I am going to object to that, the form of the question, if your Honor please, as calling for the conclusion of the witness.

The Court: I think it does call for the conclusion.

Mr. C. H. Jacobs: I will withdraw it.

Q. What I want to know is what Mr. Ramsay reported to you when he called you on that occasion. You now remember, I take it, that he did call you?

A. Mr. Jacobs, that's been so long ago I can't tell you exactly what he told me on that telephone conversation.

Q. Do you remember his mentioning the trust agreement? [544]

A. I can't say that I do; I can't say that I don't. All I can say is I truthfully don't remember.

Q. Mr. Hunter, when did you first know—when did you first hear of these meetings that took place on October the 6th and October the 8th?

A. Are they the meetings with Mr. Pasquinelli

(Testimony of John W. Hunter.)

and Mr. O'Connor—are those the meetings you refer to?

Q. Yes, when did you first hear they occurred or were going to occur?

A. Frankly, I never heard about the O'Connor meeting until yesterday. Now, the Pasquinelli meeting I heard about—and I heard about it the time it was going on because Bill would call me. At least I don't recollect the O'Connor meeting until yesterday. I certainly don't.

Q. From whom did you hear about them the first time? A. About these meetings?

Q. Yes. A. Mr. Ramsay would call me.

Q. Did he call you on this occasion?

A. On which occasion, sir?

Q. In regard to these meetings, reporting about these meetings.

A. To the best of my recollection, Mr. Jacobs, Mr. Ramsay never mentioned having a meeting with Mr. O'Connor. Now, he did tell me that he was at a meeting with Mr. Pasquinelli [545] to draw up the note, I am sure——

The Court: What was that?

A. He did tell me he was in some meetings, your Honor, with George, and I don't know who else—I don't remember exactly—to draw up the note and finalize this deal and that was at the time it was being made.

Q. (By Mr. C. H. Jacobs): You mentioned plurality of meetings—you mentioned more than one. Did he mention more than one in this report?

(Testimony of John W. Hunter.)

A. Mr. Jacobs, he didn't give me any written report. I said it was a telephone conversation. I'm sorry.

Q. I am referring to your telephone conversation.

A. I don't know whether it was one meeting or more meetings. It's just been too long ago.

Q. Now, didn't he, in making that verbal report to you by telephone, tell you what had transpired at this meeting or these meetings?

A. I would say he certainly did; anything he felt was important for me to know.

Q. Now, when did you first see this trust agreement?

A. I don't know when I first saw it. I heard about it. That's for sure. But to tell you when I first saw it, I can tell you, if this is the question you would like to hear me say one way or the other——

Q. Please give us the facts. [546]

A. All right. The facts are that I certainly didn't see it, Mr. Jacobs, until after this deal was completed. No, that I say without qualification. Just when I did see it or—I just don't remember.

Q. When you say you didn't see it, don't you really mean you didn't read it?

A. I mean I didn't see it, Mr. Jacobs.

Q. You never saw the document itself at all until after these warehouse receipts had been released, is that your testimony?

A. That's absolutely correct.

(Testimony of John W. Hunter.)

Q. And you can't remember, am I correct, whether Mr. Ramsay told you before that time what was in that document?

A. He may have and he may not; I don't remember that he did, no, sir.

Q. Now, he may have——

A. He may have. I certainly wouldn't say, Mr. Jacobs, he didn't.

Q. When did you first learn that this October transaction was contemplated, that Mr. Elliff proposed to give you a guaranteed note?

A. Mr. Ramsay called me and asked me about it.

Q. I asked you when.

A. Oh. Just—I don't know the dates again, your Honor. It was after Mr. Ramsay was down there with Mr. Elliff and [547] talked to him, and then Mr. Ramsay called me, and then Mr. Elliff called me, between—after Mr. Ramsay called me, and I think it was—well, it was right at the time Mr. Ramsay was down, when this whole thing was down, in a short period of time, but tell you the date, I can't do it, except for what I heard here yesterday.

Q. When did you first hear that the trust was to be set up, a trust of any kind in connection with this note?

A. Mr. Jacobs, I said that Mr. Ramsay may have mentioned it over the telephone, but I can't say that he did or say that he didn't.

Q. Please distinguish what I am asking now from what I asked before.

(Testimony of John W. Hunter.)

I am asking you now when you first heard that any kind of trust was to be set up in connection with this note transaction.

A. Is your wording "was to be set up"?

Q. Yes.

A. Well, I am sorry, Mr. Jacobs, I don't understand the difference between——

Q. Didn't you know about it in advance?

A. I will have to answer the question to the best of my ability, and that is——

Q. Do you——

A. ——that Mr. Ramsay might have told me on one of these [548] telephone conversations, but I can't say that he did or say that he didn't.

Q. As a matter of fact, Mr. Hunter, wasn't that your suggestion, that the trust be required?

A. Mr. Jacobs, absolutely no.

Q. Now, how did you expect to get paid on this note?

A. We expected to get paid by the terms of the note.

Q. The note itself independently of the guarantee?

A. No, sir, we certainly wouldn't have taken the note without the guarantee.

Q. Did you have any expectation that Elliff would be able to pay that note without the aid of his mother-in-law?

A. Yes, I thought that he had a fighting chance if he paid attention to business and watched his

(Testimony of John W. Hunter.)

accounts receivable and sold people who would pay him promptly.

Q. The last part of that answer I didn't get.

The Court: "And sold people who would pay him promptly."

Mr. C. H. Jacobs: I see. Thank you.

Q. Now, did you at any time during the negotiation of this October transaction promise to continue to supply Elliff with stock in trade?

A. Mr. Jacobs, I don't think we promised him, no. If you want to qualify that word "promise," it might have been discussed. But promises, I don't think we promised anybody anything because it all would depend on whether or not they [549] paid their bills and lived up to their agreements.

Q. Well, did you consider at the time of this October transaction that Mr. Elliff had paid his bills and lived up to his agreements with you?

A. No, sir, I did not.

Q. Well, am I correct in inferring that you had no intention of continuing to supply Mr. Elliff with stock in trade?

A. No, sir, you are not.

Q. Correct me then. To what extent am I wrong?

A. This would apply—I am just speaking from our general practice, not just specifically what might have happened right there, because I don't know anything happened or not—Is that what you want me to tell you?

Q. No. I want you to tell me what you intended to do, if anything, about supplying Mr. Elliff with stock in trade.

(Testimony of John W. Hunter.)

Mr. Shapro: This is after October?

Q. (By Mr. C. H. Jacobs): That is what you intended during this October transaction, during the negotiation of it, to do after it had been consummated?

A. Well, we intended to continue to help him if he showed that he was worthy of our help and if he could pay his bills and was paying attention to business, why, naturally we would like to sell him anything just like we would anybody else.

Q. At the time of this October transaction, you didn't consider, did you, that he was in a position to pay his bill? [550]

A. No—wait now—felt that he was able to pay the bills that he had now, but I didn't know what he would do in conducting his business in the future, Mr. Jacobs. I couldn't say that. That's what I mean when I say it is what his position is and what he does in the future. At that time, I do feel that if he liquidated everything he had, he could have paid everybody off that we knew about.

Q. Mr. Hunter, is it your testimony that you had no knowledge that he owed anybody outside of the business creditors that he had? I am referring to the time of this October transaction.

A. That is true, except the people that showed on that statement. And, to be perfectly honest with you, at that time I had even forgotten about those, too. They had been a very small amount; I think something like \$5,000.00, but I'm not sure.

Q. Now, you knew at that time, did you not, Mr.

(Testimony of John W. Hunter.)

Hunter that he had suffered a financial loss in connection with the Coast Range Lumber Company business? A. Yes, sir. Mr. Elliff told me he had.

Q. And you knew that he was indebted to banks and otherwise in connection with the closing of that business, did you not?

A. No, sir, I did not. In fact, he told me to the contrary.

Q. He did. When did he tell you that?

A. He told me that Coast Range deal, he had written it off [551] and it was paid for and he was away from it.

Q. Well, now, did he say how it was paid for?

A. No, sir.

Q. And you didn't enquire?

A. No, sir. In fact, one of his other former partners told me they had a loss up there, too. Mr. Pasquinelli told me they had a loss up there and he had written it off to experience, too.

Q. Did anybody tell you that Mr. Elliff had paid all of his obligations in cash in connection—all his obligations in connection with the Coast Range Lumber Company closing?

A. No, sir, no one did.

Q. And you didn't enquire?

A. No, sir, I didn't.

Q. I think you said that Mr. Pasquinelli had been a friend of yours for some years.

A. The first time I met Mr. Pasquinelli was at our meeting in the Fairmont Hotel. That has been the length of time I have known Mr. Pasquinelli.

(Testimony of John W. Hunter.)

Q. You had high regard for the gentleman?

A. Yes, sir.

Q. I am referring now again to the time of this October transaction.

A. Yes, sir.

Q. And you never asked Mr. Pasquinelli whether Mr. Elliff [552] was indebted to anybody on account of the closing of the Coast Range Lumber Company's business?

A. I certainly did not. It wasn't a very pleasant subject with Mr. Pasquinelli and he didn't discuss it very much.

Q. You knew that Mr. Pasquinelli had been an associate of Mr. Elliff's in that transaction, in that business, did you not?

A. Yes, sir, I did.

Q. You knew, did you not, that all of the capital of that business had been borrowed from these four associates, Mr. Pasquinelli and Mr. Elliff, and Mr. Solomon, I believe it was, and Mr. Charles Lannin?

A. I didn't know whether it was borrowed, Mr. Jacobs, or they put it in. I didn't know that, no.

Q. You knew it might have been all borrowed; you didn't know whether it was or not?

A. I did not know.

Q. You never asked?

A. I did not.

Q. Now, then, you also knew, did you not, that the account of Mr. Elliff in partnership with Mr. Hodes, the account between that partnership and your company, had never been current, it never had paid the debts on time—I mean, the bills to you on time—you knew that, didn't you? You were the credit manager, I believe you told me. [553]

(Testimony of John W. Hunter.)

A. At what period are you asking this about?

Q. I am talking now about the experience that your company had had with the Abbott Lane partnership.

A. Well, my answer to that, yes, I knew that they were slow paying. But we got every dime from them.

Q. You say you knew you had gotten every dime from them? A. Well, I say every dime.

Q. Are you sure that—

A. It was very close. I think it was a few dollars one way or the other. I knew that they had gone along and paid something on account.

Q. What I am showing you now, Mr. Hunter, is Plaintiff's Exhibit 12, which is a photostat of your own ledger account—that is, of your company—with Abbott Lane; and Plaintiff's Exhibit No. 4, which is the ledger account of your company with Pine Supply Company. You kept track of those accounts, did you not, as the items accrued upon them?

A. I never go to the actual accounts themselves. I do none of the posting or any of that. Every Friday—No, it's not done at my authorization, either. It's done automatically by the book-keeping department. Every Friday I get a list of all of our accounts receivable, aged, and the amount due us. That is every Friday of every week. That is as far as I know about the records.

Q. And when you get your statement regarding the amounts due, [554] you also get on that same

(Testimony of John W. Hunter.)

statement an indication of how long those amounts have been due you, don't you?

A. That's correct.

Q. Now and again you do examine these records, do you not, such as this ledger account, ledger accounts of Abbott Lane and Pine Supply?

A. Mr. Jacobs, I do not.

Q. You never do? A. That's correct.

Q. You rely on your bookkeeper to make transcripts from them, summarize—summaries from them and give them to you?

A. Yes, sir. Not only for this business but other businesses.

Q. Did you not know also at the time of this October transaction that Pine Supply Company account had never been current?

A. I knew it was always slow. I wouldn't say it never reached a current point but I knew it had always been slow. I was very well aware of that, Mr. Jacobs, yes, sir.

Q. You also knew that you were holding three dishonored checks, did you not, that had been given to you and credited on the open account but never paid?

A. I knew that we had checks that were returned from this—that Pine Supply had given us, that had gone to the bank and bounced. Some of them we returned back and so they got back. Now, just what they were at that date, I wasn't absolutely aware, but I knew we had some that were refused at the bank. [555]

(Testimony of John W. Hunter.)

Q. Wasn't it by your instructions that these notices of protest that comprise Plaintiff's Exhibit 16 were given? A. I beg your pardon?

Q. Wasn't it by your instructions that these notices of protest were given?

A. Were given to whom?

Q. Given to Mr. Elliff, among others.

A. No, sir, we got these back from the bank just automatically. I had never seen one before until the bank had sent it back to us. We gave them no instructions whatsoever.

Q. What bank are you referring to?

A. The Canadian Bank of Commerce of San Francisco.

Q. Well, you received copies of the notices that were given, did you not? A. Yes, sir.

Q. And you personally saw those notices, didn't you? A. Yes, sir.

Q. And you received those notices, didn't you, prior to this October transaction? A. Yes, sir.

Q. So that you knew, didn't you, that the six checks had gone to protest?

A. Yes, sir, I knew at one time. I didn't know just how many there were at that particular time.

Q. Didn't you have that in mind in this connection with [556] this October transaction?

A. Didn't I have in mind these checks were refused from time to time?

Q. Yes. A. Yes, I certainly did.

Q. That they had gone to protest? A. Yes.

(Testimony of John W. Hunter.)

Q. And did you not telephone Mr. Elliff in connection with these protested checks?

A. Yes, sir, I did.

Q. And didn't you tell Mr. Elliff that he would have to make them good or else?

A. Or else we would stop selling him lumber, if that is what you mean, yes, sir.

Q. And you did order the deliveries of lumber stopped in August, did you not, of 1953?

A. I can't say that I did or didn't. I wouldn't be positive of that. If anybody ordered them stopped, I didn't, Mr. Jacobs.

Q. Well, now, I call your attention to the deliveries shown by the invoices entered on this Exhibit 4, which is the Pine Supply open account, and ask you whether that doesn't refresh your recollection as to what deliveries were stopped.

A. Yes, it certainly does. If it doesn't show on this [557] sheet, why, we didn't make any deliveries. But I think there was one delivery or two deliveries after that. Wasn't there?

Q. Beg your pardon?

A. Wasn't there one or two deliveries after this, after the October transaction?

Q. Well, look at the statement—I mean, look at the ledger.

The Court: There were some deliveries. Let's try to move along. Weren't there deliveries in November?

Mr. C. H. Jacobs: There were some in Novem-

(Testimony of John W. Hunter.)

ber after this transaction. I am talking about prior.

The Court: Yes.

Mr. C. H. Jacobs: Yes.

Q. Mr. Hunter, you never did deliver any of these three checks which were still held by you at the time of the October transactions, you never delivered any of those to Mr. Elliff later, did you?

A. No, sir, I didn't. I might add, if I may—it will help clarify that——

Q. You can explain your answer if you want to.

A. Those three checks that you now have here were found in this same folder, your Honor, as I referred to yesterday. They were in the bottom drawer of my own desk and not where they should have been.

Q. They were still held by Twin City Company, the old firm, [558] were they not?

A. Well, the old or the new, it's just in the office.

Q. They were never mentioned in connection with the reorganization; they were still held by the old firm at the time when this suit began, were they?

A. Our accounting firm came in and made all those book transcripts. I heard Miss Swanson say that account was transferred over. I am sorry, that's the best answer I can give you on that.

Q. In other words, all that you have to give us on that subject is what Miss Swanson said?

A. That's right, because our accountants handled the transfer of the records and so forth, like that.

(Testimony of John W. Hunter.)

I don't go into the books, Mr. Jacobs, I am sorry, I just don't do it.

Q. All right. Now, at the time of the October transaction did you have a report, either verbally or in writing, from Mr. Ramsay, regarding the condition of the financial affairs of Pine Supply Company? A. Verbally, yes.

Q. And when did you get that, how long before this October transaction? A. Just before.

Q. Just before. In other words, late in September, or very early in October and prior to October 6th?

A. It was when Mr. Ramsay was down there checking those [559] records, when I was checking that record the latter part of September or October, I'm not sure.

Q. Where were you when you got it?

A. I was in Los Angeles.

Q. I see. You got it by telephone, is that right?

A. That's right. He might have confirmed it by memo, I don't know that he did or didn't.

Q. Have you looked in your records to see whether you have any memo of that nature?

A. I looked in a Pine Supply file.

Q. You don't find any? A. No, sir, we didn't.

Q. And didn't he report to you that the Pine Supply Company affairs looked to him very shaky?

A. No, he didn't.

Q. He didn't. Did he say they looked very promising?

A. He gave me the facts and I drew my own

(Testimony of John W. Hunter.)

conclusions on it. I draw my own conclusions on the credit of companies. That's my department.

Q. I see. So he didn't express any opinions, but he just gave you information that he had gotten off the books, is that right?

A. I wouldn't say he didn't express an opinion, Mr. Jacobs. I don't know whether he did or didn't.

Q. You don't remember that conversation very well, I take [560] it.

A. Yes, I certainly remember what he told me about the accounts.

Q. Well, let's hear what he told you.

A. Well, he told me——

Q. As you remember.

A. He told me that the accounts receivable plus the warehouse account was certainly a great deal greater than the money owed us.

Q. Did he tell you how much?

A. Yes, he did, and I can quote the facts quoted in court; but if I hadn't heard him, I doubt if I could. And I checked into it to find out what they were. In fact, I have them on a piece of paper here in my——

Q. You got them from subsequent testimony by Mr. Ramsay, is that it?

A. Well—and looking at the records, what was owed us and what the testimony was and so forth. I mean, if you had met me on the street after we had gotten the note, I probably—shortly after I got the note, I couldn't have told you.

Q. Now, between May 15 and September 18,

(Testimony of John W. Hunter.)

1953, Mr. Hunter, you wrote Mr. Elliff a number of letters, did you not? A. Yes, sir.

Q. Regarding the state of his account?

A. Yes, sir. [561]

Q. And what he ought to do to improve the posture of his affairs? A. I think I did, yes.

Q. Will you examine this group of letters which constitutes Plaintiff's Exhibit 3 and just tell us whether you recognize those letters as letters which you wrote to Mr. Elliff?

A. Well, without taking the time to read them, I see they are on our stationery and——

Q. And bear what purports to be your signature?

A. I signed them all except those initialed "D.R." which I let the secretary do, which is Denny Ramsay.

Q. If you have any doubts about any of them, would you express it?

A. I don't have any doubts about them, Mr. Jacobs.

Q. Let the letters speak for themselves.

Now, Mr. Hunter, you told us that in conversation with Mr. Elliff on May 3, 1954, you were relying largely on his personal financial statement that you have identified.

A. Mr. Jacobs, I don't believe I said that.

Q. I understood you to. If I am wrong, why, correct me.

A. I had Mr. Elliff's statement and also the other statement on Pine Supply, signed by Mr.

(Testimony of John W. Hunter.)

Hodes. In addition to that, I did rely on George's past performance and honesty. I did say that.

Q. Did you ever make any investigation for the purpose of [562] verifying the items contained in this financial statement, Defendants' Exhibit I?

A. Nothing further than my conversation with Mr. Elliff.

Q. Did you continue to rely on this statement after that interview on May the 3rd, 1953?

A. After this thing got to going, and the accounts were being paid slowly, we continually asked for a new statement on Pine Supply, which we never received.

Q. You also asked for a personal statement of Mr. Elliff, did you not?

A. I don't think so. Now, the letters may say that, but I think when I say "for your statement," I am talking about his Pine Supply statement.

Q. Would you like to take a look at these letters and note the references that they make to his furnishing a personal financial statement?

A. Well, if I did, I did. I say I don't remember it now. If it is in this letter——

Q. I thought that might recall it to your mind.

A. If it is in the letter, I said it, Mr. Jacobs. Which letter is it in? May I see it myself?

Q. There are three of them.

A. Where I ask for personal financial——

Q. There are three of them that I find.

A. Where I say "personal"? [563]

Q. Yes.

(Testimony of John W. Hunter.)

A. Would you mind showing it to me, please?

Q. No. Here's the first one, May 28, 1953.

A. (Reading) "For your information, I will be in San Francisco on Monday and Wednesday of next week. I hope that this time I will be able to see you and discuss your present financial condition."

That doesn't say "personal." It says, "your present financial condition."

Oh, yes. Then it goes on to say:

"* * * a current personal and company financial report * * *"

Q. "If HAC has not asked you to please prepare a current personal and company financial report * * *"

A. That's right.

Q. That was on May 28th?

A. All right. Let's see if there are any more.

Q. Here, you have on June 5, 1953——

A. That's right. That's right.

Q. Then we have on June 17, 1953——

A. You're correct, Mr. Jacobs, yes.

Q. Although you never got that from him, that personal financial statement——

A. Or the company.

Q. ——or the financial statement of Pine Supply Company [564] all that you investigated were the affairs of Pine Supply Company, am I correct in that statement?

A. I wish you would repeat yourself and make it more specific.

Q. You told Mr. Ramsay, as I understand it——

(Testimony of John W. Hunter.)

he went in accordance with your instructions, didn't he, to make this audit of the accounts of Pine Supply Company? A. That's right, sir.

Q. But you didn't instruct him to make any inquiry into the personal financial affairs of Mr. Elliff?

A. That's correct, sir. Mr. Elliff didn't owe us any money. His company owed us money, and that is what we were primarily interested in, in seeing how his financial position of his company stood.

Q. Now, Mr. Hunter, weren't you aware that Mr. Elliff, at the time we are talking about now, which is the October transaction, weren't you aware that Mr. Elliff was the sole proprietor of this company? A. Yes, sir. I was.

Q. And weren't you aware that if the company owed you any money, Mr. Elliff personally owed it to you? A. Yes, sir, I was.

Q. And yet the fact is that you never made any inquiry at all into personal affairs extraneous to the business of this company? [565]

A. That's correct. I thought if we had the information on this company that we would have the information pretty well on him, too.

Q. I am inferring from what you just said—correct me if I am wrong—that you felt that he probably didn't owe anything and probably didn't have anything of any consequence outside of the liabilities that he owed and the assets that he had in this company.

(Testimony of John W. Hunter.)

A. No, I didn't say that, Mr. Jacobs. What I meant——

Q. I know you didn't say it. I am——

A. I didn't mean to infer it. Does that answer your question?

Q. I see. Well now, tell us what you did have in mind about his personal assets and liabilities, if any.

A. I didn't have too much in mind except for what he had shown us originally. We would always like to have a personal statement on any partnership agreement because the person is personally liable.

Q. Yes.

A. Most times it's pretty hard to get. They only give you the one of the business and that's all. No, the reason I wasn't primarily concerned about Mr. Elliff's personal statement was due to the fact that continually from the time that—well, even before Mr. Baum went to work for Mr. Elliff—we had asked Mr. Elliff for a statement. [566]

I knew from the time Mr. Baum was there because we had continually reports from Mr. Baum and from Mr. Elliff that Mr. Baum was working on this and was going to get it for us and *the due* to some of the old records that dated back in the Hodes-Elliff deal that it would—that was all confused and he was having a hard time.

But on not one occasion but on more than one occasion both Mr. Baum and Mr. Elliff assured me that everything was all right, that their accounts

(Testimony of John W. Hunter.)

receivable were slow but they had more money than what they owed, and I wanted Mr. Ramsay to go down there and verify that, to see—since we couldn't get it from Mr. Baum and Elliff—I wanted someone in our company to go down and see.

Q. You weren't curious as to what he might have owed outside of the liabilities of the business?

A. Maybe I should have been, Mr. Jacobs, but I wasn't at that time. I relied on the statement that we got from Mr. Elliff a few months before.

Q. Now, you continued then to rely on this statement.

Then, I take it, that you are still referring to Plaintiff's Exhibit I, insofar as Mr. Elliff's personal affairs were concerned, you continued to rely exclusively on this statement right on down to and including the consummation of the October transaction; am I right about that?

A. That is true, Mr. Jacobs. Don't misunderstand me. I [567] am not changing my mind. I asked—I had written for the—I had written for it, I had written for a new statement, but I had to use this because it was the best information we had.

Q. In place of the failure to give you the new statement that you had asked for, you continued to rely on the old one, am I right?

A. I didn't have any choice except when I finally was able I made the choice to take the bull by the horns and sent Mr. Ramsay down to check on the accounts of the company.

Q. Not to check on Mr. Elliff's personal liabili-

(Testimony of John W. Hunter.)

ties? A. That's right, Mr. Jacobs.

Q. And you personally made no such check?

A. That's correct, Mr. Jacobs.

Q. You never asked Mr. Elliff about these personal liabilities?

A. Not since the time he originally gave me this (indicating).

Q. "This" being Exhibit I?

A. That's correct.

Now, I answered that pretty hurriedly. I certainly don't—I didn't—. No, I didn't. I was going to say I didn't. I didn't. I am sure I didn't.

The Court: You mean orally?

A. That's right, sir. [568]

Q. (By Mr. C. Huntington Jacobs): And never had any of your associates or your employees make any such inquiry, is that your testimony?

A. To my knowledge, Mr. Jacobs, and not by my instructions, that's my testimony, yes, sir.

Q. Now, at the time of this October transaction did you know where Mr. Elliff had obtained the money with which to buy Mr. Hodes' partnership interest? A. No, sir, I did not.

Q. Did you ever ask? A. No, sir, I did not.

Q. At the time when this partnership between Elliff and Hodes was dissolved, on or about the 20th of May, 1953, you were informed of the dissolution, were you not? A. Yes, sir, I was.

Q. And you were told that it was going to occur before it did occur, were you not?

A. Yes, sir.

(Testimony of John W. Hunter.)

Q. You knew it in advance, that it was going to happen? A. Yes, sir.

Q. And who told you? A. Mr. Elliff.

Q. And when?

A. Once again, Mr. Jacobs, I can't tell you the date but it was prior to when it was done. At least George told me it [569] was prior to when it was done. I had no reason to believe it wasn't. In fact——

Q. Was it in April or was it in May of 1953, can you tell us that?

A. No I can't, Mr. Jacobs. I know that George said that he was pleased that he was going to get out of it, the deal with Mr. Hodes, because he had heard some things that he didn't think would help their business and he would rather have it all alone. He was very pleased about it.

Q. At that time you knew, did you not, that the so-called Abbott Lane Company had an excellent credit rating—not excellent but good.

A. I beg your pardon?

Q. They had a good credit rating, Abbott Lane, as a creditor.

A. I don't think they had been in business long enough to have anyone say that they had a good or a bad one.

Q. Did you know what their rating was?

A. No I did not. I did not. As a matter of fact, I don't know that they had a rating in the red book.

As a matter of fact, I would doubt that they did have one that soon.

(Testimony of John W. Hunter.)

As I understand it, what they told me, the way that I remember the deal, they just started a very short time before it was dissolved.

Q. Well you knew, did you not, that Abbott Lane had been a [570] firm that had been established for some years in the north—that is, in or around Seattle—and had been in business for a considerable number of years up there and then that Mr. Hodes brought it down to California; as a credit man, you knew those things, didn't you?

A. No, I didn't. But you refresh my memory there.

It seems to me that I do remember that George told me that it was a name that had been used formerly by Mr. Hodes. But I didn't know of the details that you just now have given me. No, I didn't.

Q. Did you know anything about Mr. Hodes' personal responsibility at the time of this dissolution?

A. The only thing I knew about is what had been told, that they had—that he was running a business and making money at it.

Q. And didn't you tell Mr. Elliff, George, that if he was going to dissolve this partnership with Hodes or if that partnership was going to be dissolved he would have to put some money, more money into that business?

A. From what I remember of the deal, I think I did. I feel sure I did because he would need some more money in the business.

(Testimony of John W. Hunter.)

Q. And when did you tell him that?

A. I imagine at the time he was telling me it was going to be dissolved or shortly after because that is when I would [571] give it some thought.

Q. The discussion regarding the dissolution of the business also included a discussion of his obtaining—regarding his obtaining supplies from your company, didn't it?

A. Would you repeat that again, please?

Q. Withdraw the question and replace it.

In this same discussion in which he mentioned the intention to dissolve the business or the fact that it was going to be dissolved, in that same discussion you had a discussion with him regarding furnishing him with stock in trade, did you not, after the dissolution?

A. Yes, we discussed furnishing stock in trade to Abbott Lane, and he told us—told me he was going to dissolve and wanted to know if we would continue on the same basis.

Q. And you told him you couldn't, didn't you?

A. I beg your pardon?

Q. You told him you could not.

A. I did no such a thing.

Q. Oh? A. We did it.

Q. You did continue on the same basis.

A. Yes. I am sure it was right on the same basis.

Q. Well now, this basis that you are referring to—

A. Well, I mean— [572]

Q. Was the May agreement, wasn't it?

(Testimony of John W. Hunter.)

A. That's right, yes, sir. That's right. That is what I wanted to make clear.

Q. And that has just been—. That had just been arranged for in view of the approaching dissolution? A. That's what I wanted—

Q. Did it not?

A. No, I am pretty sure, Mr. Jacobs, that George had discussed with me if we would do the same thing for Abbott Lane. No, I am not positive of that but I am practically positive of it, and if I had a gun at my head I would say we had discussed it because it wasn't anything new.

As I remember it, George wanted to know if we would go ahead and make the deal with Pine Supply just as we were going to make with Lane.

Q. In other words, he wanted to know whether you were willing to enter into this May arrangement and furnish supplies to him as an individual doing business as Pine Supply Company under that arrangement, is that your testimony?

A. That's correct, sir. I think we are saying the same thing.

Q. I think so. Before you had this conversation about your willingness to do that had you ever had any similar arrangement with Abbott Lane?

A. I think it was just in the talking stage. We never had a warehouse set up at that time but we were talking about it at the time that Abbott Lane was dissolved.

I am pretty sure—

Q. You didn't have any warehouse set up, as you

(Testimony of John W. Hunter.)

call it, until after you had this conversation with George Elliff, did you?

A. No, but it had been discussed prior to that. I feel confident that it had.

Q. Now didn't you in the course of this discussion tell him that if you had this warehouse arrangement then it would be possible for you to do business with him as an individual?

A. No, sir. Mr. Jacobs, we were discussing this warehouse setup when there was an Abbott Lane in existence. He just wanted to know if we would do it with Pine Supply the same as we were doing—were going to do with Abbott Lane.

Q. What change did this warehouse arrangement make in your dealings with the Hodes Elliff partnership?

A. Well, we were selling a little bit on open account but George said he had to have more inventory and Hodes didn't want to put any more money into it, and he didn't have enough money to carry the proper inventory, and he wanted to increase his inventory and wanted to know if we would help him. [574]

Q. Didn't you tell him that you would do that on two conditions, if he entered into this warehouse arrangement—

A. Beg your pardon?

Q. Didn't you tell him you would do that on two conditions, one, that he enter into this warehouse arrangement; two, that he put more money into the business?

(Testimony of John W. Hunter.)

A. Mr. Jacobs, the warehouse arrangement had been discussed with the Abbott Lane deal.

Q. Yes?

A. No, I would like to get that point to you clearly.

Q. You have made it. Go ahead.

A. No, the only thing that I would have told him—that I did tell him—because we did it—was that we would do the same thing with Pine Supply as we were going to do with Abbott Lane.

Now, not as a condition I don't believe, but I told him that it was in my opinion—in my opinion he should certainly put some more money into the business—as I remember, it was about two thousand dollars, not very much—to help him carry this thing along.

Q. Now you knew, did you not, that he actually did put \$7,000.00 into that business, approximately, after this conversation that you have just referred to?

A. It seems to me that sometime after, but not right away, it was actually after we set up the warehouse agreement, [575] that George did come to me and tell me that he had put some additional money into that business.

Q. And the amount that he mentioned at that time was \$7,000.00, was it?

A. I can't tell you whether it was or wasn't.

Q. He told you, did he not, where he got that money?

(Testimony of John W. Hunter.)

A. I just can't answer that yes or no. I don't know that he did or didn't.

Q. You can't recall whether he told you that he had borrowed it from his mother-in-law or not?

A. No, I can't say.

Mr. C. Huntington Jacobs: I think that's it.

The Court: Let's take a recess.

(Short recess taken.)

Mr. Robert Jacobs: I have no questions.

Redirect Examination

Q. (By Mr. Shapro): Mr. Hunter, I show you Defendant's Exhibit I, the personal financial statement of Mr. Elliff, as of April 7th, 1953, and call your attention to the reverse side thereof and a description of real estate and ask you to read it and then tell the Court whether or not that refreshes your recollection with respect to the subject matter about which Mr. Jacobs interrogated you as to your inquiry of Mr. Elliff if there was a mortgage on the real estate.

The Court: What Exhibit are you showing him?

Mr. Shapro: The financial statement, Exhibit I.

The Court: Of Elliff?

Mr. Shapro: Of Elliff, yes, sir.

A. Well, sir, what is your question?

Q. (By Mr. Shapro): The question is, reading this is your memory refreshed as to your inquiry or lack of it as to a mortgage on the real estate at the time you discussed that statement with Mr. Elliff?

(Testimony of John W. Hunter.)

Mr. C. Huntington Jacobs: No mortgage has been mentioned, if your Honor please. I think the only mention of an incumbrance was a trust deed.

Mr. Shapro: Let's call it trust deed. I am sorry.

A. Well my statement was, Mr. Shapro, was that if it showed encumbered I undoubtedly asked him about it. On the one piece of property it says—Mount Hamilton Road, the one acre—it definitely says "Clear."

So I am sure I wouldn't ask him about that.

It shows down here balance owing on the other piece; I might have asked him about that.

Mr. Shapro: I see. No other questions.

Mr. C. Huntington Jacobs: No questions.

I neglected yesterday to offer the transcripts to which I had referred in cross examining Mr. Ramsay. This is a copy of the official record.

Mr. Shapro: As long as it is limited to the items read [577] to the witness, I have no objection to it.

Mr. C. Huntington Jacobs: That's all. And they are marked.

The Court: What portions are there so that we will have no doubt about it? I made a note of one of them, page 13, line 5 was one of them—if that's the same transcript you are talking about.

Mr. C. Huntington Jacobs: Lines 5 to 8. Page 13.

The Court: What is the other page?

Mr. C. Huntington Jacobs: The other I am looking for. The other one is Page 14, lines 15 through 20.

The Court: All right. The portions of the

transcript indicated by counsel may be admitted in evidence. Exhibit 22.

(Transcript in the Matter of George F. El-liff, an individual doing business as Pine Supply Company, Bankrupt, No. 43322, Examination of William W. Ramsay, received in evidence and marked Plaintiff's Exhibit 22, limited to those portions hereinabove designated.)

The Court: All right. Anything further?

Mr. Shapro: Nothing further from this witness.

The Court: Step down.

(Witness excused.)

Mr. Shapro: The defendant rests, your Honor.

Mr. C. Huntington Jacobs: There will be no rebuttal.

The Court: All right.

(Matter continued to 9:30 o'clock a.m. Thursday, December 8, 1955, for concurrent submission of legal memorandum, and for presentation of oral argument.)

[Endorsed]: Filed July 9, 1956.

[Title of District Court and Cause.]

Thursday, December 8th, 1955

Mr. C. Huntington Jacobs: If your Honor please, the plaintiff and the cross plaintiff offer these memoranda of points and authorities on which we respectively rely.

I speak for Mr. Robert Jacobs to save time.

It seems to me, your Honor, that the salient fact

in this case is the trust agreement. Perhaps I should make that plural and say also the circumstances under which it was executed.

May I ask the Court whether the Court has had an opportunity now to read the trust agreement?

The Court: Yes.

Mr. C. Huntington Jacobs: From beginning to end?

The Court: Yes.

Mr. C. Huntington Jacobs: That trust agreement it seems to me is so important, your Honor, because in connection with the circumstances surrounding the making of it, it is so relevant of an intent to hinder or delay or to defraud.

Consequently the actual fraud of which in part the trustee, the plaintiff, relies.

The evidence of the subject on the circumstances surrounding the making of this trust agreement, of course, includes the prior transactions between the Twin City Company and the bankrupt because of the fact that his insolvency, which had originated with the collapse of the [580] Coast Range Lumber Company in 1952 continued throughout all of his dealings with Twin City that followed that collapse.

They retraced them, as your Honor will recall, by oral testimony and by exhibits through his disastrous partnership with Hodes which concluded in a disastrous settlement he made with Hodes and continued throughout his subsequent dealings with Twin City Company as the sole proprietor of the business as Pine Supply Company.

I think it needs some emphasis that in his settle-

ment with Hodes he parted with any right to the name of—under which the partnership had originally operated—that was——

The Court: Abbott Lane.

Mr. C. Huntington Jacobs: Abbott Lane, thank you, sir.

And Hodes took that, which was the only asset of apparently substantial value for the rest of his net worth—for the rest of the net worth that is, of the Abbott Lane partnership which was a negative quantity as Mr. Baum testified.

The bankrupt paid a substantial sum to Mr. Hodes in one way or the other. That settlement used up the principal value of the real estate that Elliff had previously sold to Hodes.

It also involved an obligation, his paying an obligation [581] to Hodes of some—something in excess of \$6000.00. I don't recall the exact figure, it's in evidence.

In short, if he wasn't insolvent before that settlement of the Elliff Hodes partnership, he certainly was insolvent at all times after that.

He came down into the October transaction trailing a large number of bouncing checks behind him, all of which were known to the—at least those that were given to Twin City—and some six of them had gone to protest, as appears from the plaintiff's Exhibit 16.

We have a very natural consequence of the very poor record of payments that is shown by the ledger sheet of the original partnership account, and also of the account under the name of Pine Supply

Company. Those are Exhibits 12 and 14, respectively.

We have as a natural consequence of those records and of the bouncing checks a considerable number of letters of complaint directed to Elliff by the president of Twin City Company, Mr. Hunter, all of which Mr. Hunter identified as well as Mr. Elliff.

And it is worthy of note, your Honor, that although Mr. Hunter had obtained at the outset of their dealings—of his dealings I should say—with Elliff, in the capacity of proprietor of Pine Supply Company, although he had obtained a financial statement from Elliff purporting to show his [582] actual financial conditions, he was so dissatisfied with it that in those letters he repeatedly demanded a new one and repeatedly demanded conferences with Elliff about his personal affairs as well as his business affairs.

Now Mr. Hunter on cross examination, of course, stated that he knew Elliff was the sole proprietor of that business following the dissolution of the Elliff Hodes partnership.

He knew that and consequently knew that the totality of his assets and his liabilities was the measure of his solvency and not merely the totalities of his assets and liabilities within that business, and also his assets and liabilities extraneous to it.

He knew that, and he was constantly demanding this statement which he never got. And still he says he continued to rely upon the statement that he had

received, with which he was dissatisfied evidently or he wouldn't have wanted a new one.

He evidently did not suppose that the statement any longer—if it ever had—represented the true financial condition of this man.

And he had every reason to suppose it didn't because while the statement, for example, showed a net worth, a positive net worth for that Elliff Hodes partnership, in which Elliff was then engaged, the actual net worth of that partnership, as shown by Mr. Baum, was a substantial negative [583] quantity.

And Elliff had actually, as I have said, paid heavily for Mr. Hodes share in this deficit. That's what the transaction amounted to.

Now as to Elliff. Frequently he communicated with Mr. Hunter and Mr. Hunter frequently called him up.

Elliff says that he told Mr. Hunter about his personal liabilities to Mrs. Lannin and had already told him about his personal liabilities to Mr. Charles Lannin and to Mr. Pasquinelli.

And Mr. Hunter had met those gentlemen and was at least acquainted with them. And yet he tells us that he not only did not make any inquiry into those matters himself, but that he didn't instruct Mr. Ramsay at the time when Mr. Ramsay audited the accounts of Elliff and had all of Elliff's records before him and had besides complete access to whatever information Elliff could give him that he wanted.

He never instructed Mr. Ramsay, he says, to ask

a question about any liabilities that Mr. Elliff might owe outside the business.

But those liabilities were large ones, your Honor. The liability to Mrs. Lannin amounted to some \$17,000.00 at the time of this October transaction, as appears from Mr. Baum's testimony and from her own and from Mr. Elliff's testimony particularly.

The liability to Mr. Charles Lannin amounted to a sum almost equally large, something slightly in excess of \$13,000.00 at that time.

And when we add those two figures together, we get approximately \$30,000.00 in liabilities in those two accounts alone that were in addition to the liabilities of his business.

Now he had assumed all of the indebtedness of this partnership, some of which had been incurred as early as January of 1953, others of which had been incurred of course, prior to the dissolution, and some of it in February or March of 1953. It amounted to a fairly substantial sum. And most of it still—as Plaintiff's Exhibit 21 shows—still remained unpaid at the time when he became bankrupt.

That in itself is an important point, if it please the Court, because it shows that there were at all times during this October transaction, and after the creditors of the bankrupt holding proof of claims under the Bankruptcy Act, since they were claims for merchandise supplied, that those claims have never been paid even to this very day in many instances.

Now at the time of the October transaction in

addition to his numerous conferences with Mr. Elliff on other occasions, he had what amounted to a showdown in August over the bad state of Mr. Elliff's accounts. [585]

It was largely delinquent. Many of these checks that Elliff had given him had been dishonored. He was thoroughly fed up with the transaction. He told Mr. Elliff then and there, according to Mr. Elliff's statement, testimony, and also according to Mr. Baum's, that he couldn't and wouldn't continue to ship Mr. Elliff anything further until something was done to provide a more dependable source of payment. The more demandable assurance, I should say, of payment, prompt payment.

His letters expressed the same view. There are six of those letters, your Honor; I mean the letters comprising Exhibit 3.

Throughout them you have not only references to these statements that were to be furnished by Elliff, but were demanded from Elliff and never supplied.

But you have references to his strong dissatisfaction with the way in which Mr. Elliff was conducting that business, which amounted to a showing that Mr. Hunter, at least, had very little confidence in the solubility of Mr. Elliff. He couldn't have expressed, so continuously expressed his dissatisfaction if he had confidence in him as a manager of a business.

This becomes particularly important when we recall that the supposed purpose of this October transaction was to enable Mr. Elliff to continue that business. [586]

And there we come upon the effect, the appalling effect of this trust agreement. Because that trust agreement, as your Honor will recall, not only allocated to the payment of this new note, this guaranteed note, twenty percent of the gross and not the net of the future proceeds of that business, all of them, until the note was fully paid.

But it also—and that was direct—they were to go, those payments were to go out of the gross proceeds. They were never to be mingled with the rest of the proceeds; they were to be kept intact until they were paid upon the installments of that note.

There you have one of the obvious purposes of the trusteeship that was set up.

And may it be observed there was no more occasion for Twin City Company to be a party to that trust agreement than there was to be a party to the promissory note or to the guarantee of the note.

The twenty per cent provision was a provision that obviously was inserted for its benefit as well as for the benefit of the guarantor and was more than that of great importance.

The authorities cited in my memorandum show Twin City Company's note of \$28,000.00, which it obtained from Mr. Elliff as a part of this transaction was fully secured by every item of security which Mrs. Lannin held. [587]

That, of course, included the warehouse receipts which had originally been issued to Twin City Company prior to the October transaction and were still held by it. That is a very familiar principal of subrogation and it needs only to be mentioned.

The essence of the transaction then was this, as it seems to me. Twin City Company obtained a \$28,000.00 note from Mr. Elliff. It obtained that note. It obtained \$28,000.00, a new obligation. It obtained full security for that \$28,000.00 obligation, not merely the guarantee of Mrs. Lannin, but everything else substantially, all the business assets that Elliff had or might thereafter acquire from whatever source.

If he bought a carload of lumber or a large—less than a carload lot of lumber—from some other supplier ignorant of the October transaction, that lumber under that trust agreement was to be warehoused and warehouse receipts upon it were to be issued to the guarantor of that note.

Then they became security for the payment of the note, exactly as much as though Twin City itself had held the warehouse receipts that represented that lot of lumber.

Of course, that deprives the seller of the lumber of any means of getting paid unless Elliff was able to pay him out of the remaining eighty per cent of his gross proceeds.

So the evident effect of this transaction was, if Elliff [588] was not insolvent already to insure that he would soon become so.

Because in order to continue his business at all he must inevitably contract obligations which he could not expect to pay as they matured, and which in fact he could not expect to pay at all unless his business took a large bound upwards.

Now Mr. Elliff is a hopeful person, he is a sales-

man. That is perfectly apparent. But not one fact has been adduced in this case to show that any expectation of the increase in the volume of this business, a substantial increase was based upon anything more than mere hope.

His past experience with that business had dated from the beginning of November 1952, and he had been in charge of it throughout all that period of time.

And in only two months had he done anything better than break even. He had rolled up a deficit which consumed the capital of the Elliff Hodes partnership, he had consumed \$7000.00 of the capital loaned him for the business by Mrs. Lannin. He was doing business on borrowed money. He was insolvent to start with.

And what expectation could there possibly be by either the bankrupt himself or by the payee of that note that he would ever be able to pay it unless he paid it at the expense of other suppliers with property furnished by them, presumably in entire good faith on credit and in ignorance [589] of this October transaction.

When we come to that point we see the vital importance of the evidence of concealment and of secrecy. If they ever got wind of this transaction, it was quite apparent that they would never supply Mr. Elliff with anything.

Twin City Lumber Company did in November supply him with several lots of lumber, I mean in November of '53. And it finally got paid in full, al-

though only with long delays. But they had Mr. Elliff by the back of the neck.

Now it is time to show how they did it.

When Mr. Elliff testified and when Mr. Baum testified about the purpose of that note, they made it perfectly clear that from the point of view of Mr. Elliff it was intended to be payment for the antecedent indebtedness of Twin City.

That note plus a small sum of money, about \$160.00 or so, which was paid in cash, was supposed to discharge this antecedent indebtedness.

When Mrs. Swanson, the bookkeeper of the Twin City Lumber Company testified and produced the records, we found immediately that there is no mention whatever of the note as such as a credit upon their books.

The note was never credited at all. It wasn't accepted in payment by Twin City Company. There is no evidence that it ever was so accepted. The books are the only evidence of the manner in which it was taken and received and treated. [590]

Twin City Company credited the payments that were actually received on account of that note along with this \$160.00-odd dollars as those payments were received.

I mean Twin City Lumber Company for all of the subsequent payments were made to that concern, the new firm. The books were the same. They were continuously kept and they were continuously kept by Mrs. Swanson.

So they treated the note as though it were secur-

ity for the antecedent indebtedness. But that was not Elliff's intention.

So we have the situation referred to in the memorandum that the note was neither given as security nor accepted in payment.

Your Honor will recall that there was a covering letter which was produced by the defendants and is in evidence as Exhibit G, I think, in which Mr. Elliff said that he told Twin City Lumber Company that the delivery of the note was conditioned upon not only the release of the existing warehouse receipts, but also upon the surrender of the dishonored checks which had never been paid and which represented some \$9000.00 of the amount.

Well, that is a demand which would be perfectly proper and supports his testimony to the effect that he considered it was payment, not security, for this antecedent indebtedness. [591]

Yet we are confronted by the fact, which is admitted by Mr. Hunter and testified also by Mrs. Swanson, testified to by Elliff, testified to by Baum, that the dishonored checks never were returned to him. They always have been kept and kept apparently by the old firm.

Whether they were turned over to the new one or not, it seemed to be immaterial. They never reached Elliff. Mr. Hunter still had them until they were produced in this Court.

That doesn't look as though that note were accepted as payment because those checks represented more than a third of the entire antecedent indebtedness.

Well, they represented more than that.

We are realists, we can see what they represented to Mr. Elliff. They represented to him the danger of prosecution, issuing checks which he had no expectation of paying that would be paid when presented.

There was one of them for which he had an excuse. That was the one that had been sent through the Douglass Guardian Warehouse Company amounting to some \$7300.00. It was left undated by him.

Douglass Guardian Warehouse Company dated it and sent it to Mr. Hunter. Well, that was a very natural result of his issuing it in the first place.

At any rate, he was in serious danger. And there was two other checks for which he had no excuse at all. And [592] there had been several others which had bounced, as I have said.

In short, you have a situation here which plainly discloses the man was in a desperate financial condition at the time of this October transaction, that Twin City Company had every reason to know that fact.

All that is required, if the Court please, is to charge the recipient of either a fraudulent transfer or of a preferential transfer where his intent or his knowledge are material at all, all that is needed to charge him with such that is evidence that he had reasonable cause to believe.

Then if he turns his back upon the information at his disposal, his ignorance is purely willful and

no defense to it because what he should know, the law would naturally deem he did.

Now when you examine the October transaction in that way, that the man was insolvent, let us say, whether there was actual knowledge of that fact by Twin City or not, that the inevitable effect of the transaction was to hinder and delay as well as perhaps to defraud—not merely perhaps, but probably, which proved to be the case of the creditors.

You have a case of actual fraud. There wasn't any consideration for this transfer that did the estate the slightest bit of good in the world.

Let's examine the transaction. [593]

None of the antecedent indebtedness was paid for. That is clear because Twin City didn't accept the note as payment, didn't treat it as payment. It kept the old account still alive on its books and it still is. We saw the books and they are in evidence.

The ones that now carry that account are in evidence as Defendant's Exhibit K.

Plaintiff's Exhibit 13 completes the tally of the defendants' records other than the former open account with Elliff, which is Exhibit 4.

So it seems very clear that the effect of this transaction inevitably was, as I say, to allocate all of Elliff's present and future assets to the security, not merely of Mrs. Lannin the guarantor, that was purely nominal, to the securing of that \$28,000.00 note without discharging any of his antecedent indebtedness at all and without actually securing any of it.

Because to a contract of collateral security, it's as

necessary as any other contract that there be some meeting of minds.

Elliff had no idea that he was merely securing past indebtedness nor any intention to do that. As to the note then you have either a substantial failure of the consideration for which it was intended to be given, or else you have a complete failure of the minds of the parties to meet, either [594] upon the proposition that it would be accepted in payment or upon the proposition that it was to be taken as security.

In other words, it was a new obligation. It added \$28,000.00 to the tally of Mr. Elliff's apparent indebtedness.

The Court: Do you contend that after that he owed \$56,000.00?

Mr. C. Huntington Jacobs: I say the note was void, your Honor. If it hadn't been, he would.

It imparted a consideration being in writing.

Now the only consideration that I can see that the evidence actually contains of anything in the nature of consideration for that note is the release of existing warehouse receipts which were then held by Twin City and which represented his then existing stock in trade.

But the actual fact of the matter—and as Twin City well knew it was, had every reason to know it, had seen the trust agreement—the actual fact of the matter was that under that trust agreement Mr. Elliff was obliged to transfer that stock in trade to Mrs. Lannin as soon as that agreement went into

effect as security for her guarantee and therefore as security for the note.

All we actually have by this release of warehouse receipts is simply an act by which the security was transferred from the old account to the new account, that is to say, the note account, the \$28,000.00 note, supporting as it [595] did along with all his future proceeds and all of his future acquisitions of stock in trade, the guarantee to Mrs. Lannin and thereafter the note.

Now it seems very clear that there is more than a casual interest in Mr. Elliff's testimony regarding what Mr. Hunter told him on one of those telephone calls that was made in the immediate dissolution of the partnership and the October transaction.

Mr. Elliff's testimony was—and incidentally I have searched my notes in vain to discover, a memo to discover any denial by either of the other two parties engaged in that conversation, Mr. Ramsay that is, and Mr. Hunter.

Elliff's testimony was that Mr. Hunter said on that occasion words to this effect, "I don't care about anybody else. We want our money."

That I will submit to the Court was exactly the attitude of that company with respect to this October transaction. And it was the attitude also of its successor, also managed by Mr. Hunter, towards the payments that were received from Mr. Elliff after the October transaction.

That brings me to the conversation of the status of this—of these defendants—of these Twin City

defendants if we can group them all under that title.

It seems very clear there was absolutely no present consideration of any financial—of any pecuniary value at [596] all which was given for either the note or for the transaction that involved the note, or it didn't either discharge or secure any antecedent indebtedness.

My analysis of that transaction is correct. There has been no meeting of minds at least, upon either of those propositions. And it did not result in the estates receiving—relieving any of the property of the bankrupt from hypothecation at all.

The same stock in trade as were evidenced by the warehouse receipts that were issued by Mrs. Lannin pursuant to the trust agreement were still encumbered to the same extent exactly as they had been before, or almost exactly as they had been before.

There may be some doubt as to whether or not these trustees ever had secured all of that antecedent indebtedness. In Exhibits 1 and 2 they were intended merely to secure the account which is laid out in Exhibit 4 and which was brought to a balance of zero before those receipts were surrendered at all or agreed to.

But independently of that, there hasn't been any question at all that no benefit resulted to the estate from the mere transfer of these Exhibits as security for one account and security for another, at least, equally large.

And so the Twin City Company and its successor had given this estate nothing at all to compensate

this estate for the [597] additional security which they got for the note.

Now this trust agreement required an incessant series of payment required as often as they received a lot of lumber, warehouse receipts upon that lumber were to be issued to Mrs. Lannin.

That was to go on as long as he was able to continue his business. Also under that trust agreement every cent that was derived from the business was to be collected by him and turned over to Mrs. Lannin's trustee into the trust agreement, that is, Mr. Pasquinelli.

In Mr. Pasquinelli's hands of course, it still was secured, not only for Mrs. Lannin's guarantee but also for the note. Until it was disbursed, and only eighty per cent of it might be disbursed with the current expenses of the business, and eighty per cent of the business' stock in trade, the other twenty per cent must go into payments upon the note.

And what did estate get for that?

A mere exchange of more indebtedness, at the most for which the original warehouse receipts were security. It seems to me very clear that Twin City cannot claim the status of a bona fide obligee for anything like a present fair equivalent value.

Of course, it had to be that in order to be immune from the trustee's right to prosecute this action under Section [598] 67-D of the Bankruptcy Act or under the equivalent provisions of the Uniform Fraudulent Conveyances Act. And also would have no rights to any equity in treatment in accordance with clause 6 of the second paragraph of subdivi-

sion F of Sections 67 because it has not parted with anything of any value to the estate.

And as the memorandum plainly discloses, your Honor, although I inserted it because the Court noted far better than counsel the law that says, "The value of the fairness of the consideration must be evaluated in the point of view of the creditors of the debt."

We have left with consideration then only the matter of these preferential payments. As to them it seems to me that the entire matter resolved itself into a question of fact.

Did the Twin City Company know or did it not know or had it or had it not reasonable cause to believe, to use the language of Section 60, subdivision A and B, "That the bankrupt was insolvent at the time when these payments were received."

I said Twin City Company inadvertently; I ought to have said Twin City Lumber Company because it was the new firm which we have had.

These new preferential payments of course, they were all received within four months of bankruptcy and they were all made in 1954 subsequent to March 10th. There is no question [599] that they were made and there can hardly be any doubt that the bankrupt was insolvent when he made it. He certainly had not improved his position, according to his testimony, according to Mr. Baum's testimony since the October transaction.

The Court: May I interrupt you for a second, Mr. Jacobs?

In counsel for the defendants memoranda, which

was filed yesterday, which I received, he makes the distinction between the second and third counts. Have you had an opportunity to read those memoranda?

Mr. C. Huntington Jacobs: No, sir, I have not. But I can imagine what the distinction naturally would be. The second count of course, as I advised the Court at the beginning of this case involves funds which are claimed also under the theory of fraud in the first count, \$2500.00.

The Court: The second count is the \$2500.00 payment on the note?

Mr. C. Huntington Jacobs: That is right, sir.

So much of the \$5000.00 paid all told as was paid to them within the four months. The other \$2500.00, your Honor will recall, was paid by Mr. Pasquinelli in December and cleared, I think that is, the check was issued in December and cleared in January of 1954.

So the payment was actually made in January of 1954, that is, before the start of the four months period. [600]

I don't know what other distinction there may be between the two things. If they are preferances, they are recoverable as such under the principles of Section 60 A and B.

But you have this situation regarding the proof of knowledge or reasonable cause to believe. They had reasonable cause to believe in October that this bankrupt was insolvent. I think that that appears by overwhelming weight of the testimony.

And I think too, that any testimony that they

didn't actually know is merely a different form of saying that they didn't want to know and declined to be enlightened by the means at hand which were at hand to enlighten them.

And those means were amply sufficient to give them all of the facts. Well, they knew or they ought to have known in October of 1953 when this October transaction occurred that the bankrupt was already insolvent.

They had seen the trust agreement—Mr. Ramsay had and he was the agent charged with the conduct of these negotiations. He had seen it according to his own testimony on cross examination about two days after the second meeting in Mr. Pasquinelli's office. There is no dispute about that.

There may be some dispute as to whether he read it. The testimony of Mr. Elliff and of Mr. Baum is that they saw him read it. There may be some doubt as to — there may [601] be some dispute as to whether Mr. Hunter got a copy of it.

The testimony of Mr. Elliff and Mr. Baum is that they left one for him with the maid at his house with these other documents which he admittedly did get. And the testimony of Mr. Hunter is that he heard about the trust agreement from Mr. Ramsay by telephone shortly after the meeting of October the 8th.

And furthermore while we are on that point, your Honor, this disclaim for any interest in the trust agreement still consorts with the established facts. It can't be disputed now. There Ramsay has admitted that he attended not one but both of those meet-

ings in October, not only the one on October 6th at which the trust agreement was only briefly discussed, according to the other people present at it, but also the one on October 8th where every term of it was fully discussed and agreed upon and where this policy of secrecy was discussed and decided upon and where the reason was given for the policy.

One was in various forms by the other witnesses who attended that conference, the reason being that it would incite litigation on the part of other creditors if they knew of it. That is the reason that was given.

What was implicit in the situation was, the further reason that the bankrupt couldn't continue his business unless he did so on credit. [602]

He couldn't expect to get credit unless he got it from others than Twin City Company as well as perhaps Twin City; that they wouldn't give it to him if they had any idea that such an transaction had occurred.

So the testimony is unanimous upon the subject that no such notice was ever given to creditors in any shape, manner or form.

Mr. Pasquinelli so testified, Mr. Elliff so testified, and Mr. Baum so testified to the best of his knowledge. Of course, his knowledge was accurate up to the end of that year, complete up to that time.

Now they say that they weren't interested in this trust agreement, that they were relying entirely upon the Lannin guarantee. The stubborn fact remains that Mr. Ramsay took sufficient interest in that trust agreement to sit through that entire con-

ference and participate in the discussion as well as to attend and participate in the discussions at the October 6th conference.

That he couldn't deny. He even made notes upon it, according to his testimony under Section 21-A, which was produced here as impeachment. Where the notes are, we don't know.

And that isn't the only record that is missing.

Mr. Ramsay made a survey of the accounts receivable of that business and dated at the meeting which consummated the [603] series of investigations that he made throughout a period of a week in the latter part of September of 1953. And he made tapes showing the liabilities outstanding in the business at that time.

And then as soon as the October transaction had been consummated, both tapes and the survey were destroyed on the orders of Mr. Hunter, according to Mr. Ramsay's testimony.

There was no dispute of it by Mr. Hunter. The secretiveness of this entire transaction is emphasized, I think, by such things as this, and also such things as this.

Although Twin City was represented at those two conferences in October, the guarantor was not. She wasn't present and neither was her attorney. They would have been had they known there was such a conference afoot, one or the other of them. It seems almost certain that neither of them was there.

They wouldn't even give her any more information about this than they had to give her in order to get her to give the guarantee. It even extended

as to a provision in the trust agreement itself on the last page against having any notice to the creditors. They might buy goods from these same people that Mr. Elliff owed money, or intended to owe money. And if they did, they might divulge the fact that Mr. Elliff's accounts receivable apparently had been transferred to a trustee, which wouldn't look well to his creditors. [604]

There was to be nothing to put the creditors on guard. They weren't on guard. They were deceived.

It was almost some nine months thereafter before a series of attachments by the creditors finally brought this business to a close.

Now Twin City knew all of that history. They knew about his past unsatisfactory performance in paying his debts to them. They knew all that at the time when these payments were made in March and April and May of 1954, within the four months period.

They knew that they had had a great deal of trouble in collecting what they claimed from him. And on account of the sales that they had made as far back as November of 1953, he was badly delinquent in it, in those matters.

One check that he gave them for \$1200.00, according to Mr. Elliff, had gone to protest. Finally, it had cleared. So that his record of bad checks was still with him and still continued. They knew all that.

And if they did not actually know that he continued to be insolvent, certainly it wasn't for want of having been warned of the facts. That would

put anybody on inquiry in that regard, that he had reason to believe that he was. It seems perfectly apparent.

I don't see any contradiction in the evidence of that fact. Mr. Hunter has been able to tell us [605] that so far as he knew, he didn't know about these personal obligations. He didn't know about Mr. Elliff's insolvency. That he had reason to know of it, that is another matter. It seems to me he had every reason to know and every opportunity to find out.

Well, I cannot see how they can dispute the right of the estate to recover the payments that were made within that four month period as preferences.

That applies as well to the second count as it does to the third count. But here you have the fourth count of the complaint.

As to that, we are on new territory. So far as I know, I will have to concede right now that frankly my research has not been able to find any instance in which any such claim has either been sustained or rejected by the Court.

I base it upon consequently what seemed to me to be fundamental principles of the law. Under Section 70-C of the Bankruptcy Act, the trustee and so-called strongarm clause, the trustee is invested with the rights of a creditor holding a lien as to all property that was actually in the possession of the bankrupt at the time of the bankruptcy.

That is July 10th, 1954, admittedly by the pleadings. And he is invested as to all other property

with the rights of a creditor holding an unsatisfied judgment.

And of course he continues in the possession of those [606] rights throughout the administration of the estate.

Now these people, the old firm namely, according to the theory of the plaintiff—and it does seem to me to be very fully established by the evidence, your Honor—they committed a fraud. They knowingly committed a fraud. They not merely participated in the fraud by the bankrupted, but they had actual knowledge of the facts sufficient to give them every reason to believe that the creditors were going to be hindered or delayed or defrauded.

Your Honor will recall that Mr. Elliff testified that they suggested this trust agreement, insisted upon it. Mr. O'Connor's testimony was that Mr. Ramsay carried the ball, as I think he said, in the discussion on that matter, the base discussion on that matter that occurred before he stopped it and said he didn't know enough about Mr. Elliff's affairs to pursue that matter.

And the testimony of all of the participants, except Mr. Ramsay, admitted he was there and may have put his two bits worth at the time of the conference before Mr. Pasquinelli.

Mr. Ramsay took part in the discussions that occurred at that conference regarding the terms of the trust agreement, regarding the policy of secrecy.

So they were fully aware. Mr. Ramsay, of course, having received and read the copy of the trust [607] agreement, which was finally prepared before the

note was ever delivered, knew exactly what it contained.

So before they received these documents these people were fully aware that that was being done there, was a hindrance, was going to be in all human probability a hindrance and a delay and a fraud upon the creditors of the bankrupt.

And they must have known that sooner or later those creditors would attempt to attach assets of the bankrupt which were under the umbrella provided by that trust agreement. And when they did, if it was a part of the stock in trade, Mrs. Lannin would have to bring forth her trust receipts, the third party claims of those assets.

And in that or any other event, the terms of the trust agreement were bound to become known to the attaching creditors. It took no foresight at all to amount to anything to foresee that when that agreement became known those creditors were going to institute litigation under the Uniform Fraudulent Transfer Act or start proceedings in bankruptcy, which is what actually finally happened. It cannot be that the start of that bankruptcy proceeding would be of any surprise at all to those gentlemen. They must have foreseen that it was likely to occur.

Then they must have foreseen too that in the bankruptcy proceedings Mrs. Lannin would certainly have to assert the same claim that she had as against these assets, not only [608] because she would want that security but also because if she did not she would be criticized by the obligee and this

contract of securityship in which she was involved. She practically would have to do it.

Of course she did it.

Considerable expense was caused to the estate by her doing it because it was necessary to find out the basis for her claim and it was necessary to find the true inwardness of the situation.

It was a highly complex picture that these people would paint in cooperation with the bankrupt. I should have said company. They must have known well in advance that when that chain of events took place, the estate was going to lose heavily by it in the expense of exposing a default and defect in this claim, namely that it arose from a fraudulent transaction.

Of course, that all happened.

The only objection that I can see or anything in the nature of an objection opposing counsel would be to this fourth count, the propriety of it.

I mean that the estate wasn't in existence at the time when the fraud which gave rise to these damages was committed. There I draw upon an analogy, the law of negligence; the books are full of cases, as your Honor is well aware of, in which dangerous instrumentalities likely to harm children [609] have finally caused harm to a child that was not even born when the instrumentality was installed or when the defect in it was allowed to occur. And liability has been predicated upon the logical sequence of cause and effect which caused that original wrong to produce that ultimate danger, the injuries of that child.

And I see no reason why fraud should be indulged to any greater extent than negligence. It seems to me it's a highly salutary principle which we ask the Court to establish here and a fraud facer cannot escape the consequences of his wrong upon any such ground as that.

It seems to me clearly that the trustee, being the representative of all the creditors under the plain implication of Section 76 in this regard has the same right to sue for the damage caused him by this fraud as that child would have to sue for the injury caused to it by the authority of the defendant.

And it seems to me further that if exemplary damages were ever appropriate in a case—and I think we have been moderate in our requests for them—it seems to me that they would be appropriate here.

Because if the fraud was ever to be penalized, it seems to me it should be penalized when it results in actual injury to innocent third parties like the creditors represented. [610]

Now in this case by this trustee. We rest our case upon that reasoning, your Honor, for lack of account to find an instance in which such a contention has been urged at all. I am reminded of the statement of a fictional character creation. Way back in 1880 or I think '90 in this book the character is being taken to task for wanting to marry a prince, of a neighboring kingdom of which there was not precedent whatever.

She told the king or her prospective father-in-

law there couldn't be a precedent for anything the first time it was done. That is the situation here.

Mr. Shapro: If it is satisfactory with the Court, I think the cross-complainant might argue and I might reply to both of them at the same time, if that is agreeable.

The Court: I suggest Mr. Jacobs who has just finished, that you might glance at the memorandum that was filed with reference to that distinction set forth between the second and third counts. You can reply to whatever argument Mr. Shapro makes on it.

Mr. Robert Jacobs: If it please the Court, I see no benefit to be gained by the Court by my going over these facts as they pertained to the trustee's case because the facts are the same and are effective in the same way towards the cross-complainant's case.

However, I would like to point out to the [611] Court certain facts which pertain only to the case of the cross-complainant, Mrs. Pearl K. Lannin.

That is first that there was no benefit shown under the facts to Mrs. Pearl K. Lannin by this trust agreement or the whole October transaction. We learned that from the testimony of Pearl K. Lannin herself in which she stated that the only reason she guaranteed this note, the only reason she took part in this transaction at all was to try and help out her son-in-law.

She gained nothing monetarily or otherwise. This is also clear from the terms of the trust agreement

itself which has been entered into evidence and which the Court says it has read.

Secondly, there was no knowledge of the fraudulent character of the transaction by Pearl K. Lannin. The testimony of Pearl K. Lannin, she said that in her conversations with Mr. Elliff he stated that he needed the money in order to get the stock in trade released from the warehouse and into easier hands because his business was good and he needed to be able to move it faster.

There is also the testimony of Pearl K. Lannin that she was given to understand very definitely that this transaction had to take place in a big hurry.

It's the testimony of Mr. Henry Robidoux, her attorney, that the transaction had to take place in a big hurry. And [612] that his investigation of the matter was very sketchy because of the great rush.

The next important part of the testimony pertaining to the case of the cross-complainant that has not been shown prior to this time is that payment was made by Pearl K. Lannin to the extent of \$2000.00.

Her testimony was to this effect and there is also an exhibit to this effect. This was made up the demand of Twin City Company, Twin City Lumber Company or its assignee.

Now it is also shown by the testimony of Pearl K. Lannin that this amount was paid prior to the time she had any knowledge of the true facts surrounding the October transaction.

There has been no showing that she had any

knowledge at all of these facts. Her testimony is to the effect that she did this in order to benefit her son-in-law. She thought her son-in-law was in good financial condition. She merely wanted to help him out.

There is also the question of damage resulting to Pearl K. Lannin, the cross-complainant, caused by the October transaction, to which we feel Twin City was an active party.

That damage has been testified to by myself and pertains to the third party claims that were asserted and which she had to defend against, at least by way of pleadings; although they went no further than that because of the bankruptcy that [613] was filed and the assertion of the claimant Mrs. Lannin to the stock in trade that was made in the bankruptcy proceeding.

And then again it is urged that the Court's attention be directed to the fact that this also was prior to the time that the true nature of the October transaction became apparent to Mrs. Lannin.

With those additional facts in conjunction with the argument made by the attorney for the trustee, we feel and respectfully request that the prayer of the cross-complainant, Pearl K. Lannin, be answered in all its particulars.

The Court: Shall we take a short recess?

(Recess.)

Mr. Shapro: First your Honor, may I extend my appreciation to your Honor and to counsel for your tolerance of my indisposition of last week. It

was a big help to me to be able to postpone this argument until this time.

In view of the fact that in the memorandum that we filed, we have covered in outline form and with some citations the legal principles upon which the defendant's case is predicated, I am going this morning, your Honor, to limit myself if I can to the application of those legal principles to the facts of the case.

With respect to the first count, which is from all standpoints the most important involved in this litigation, we have [614] an attempt by a trustee in bankruptcy to set aside what I assume is a legal obligation. The statute calls for the setting aside of transfers or obligations incurred is, you understand, fraud either constructive or actual as a subdivision of D.F. Section 67 sets forth.

Counsel in his argument this morning referred to transfers. If it is contended there is a transfer to be set aside here with respect to the first count, the note, I am at a loss to understand it.

The physical facts, and I in discussing this phase of the matter your Honor, I am going to assume for the purposes of the argument the facts as contended for by the plaintiff—in other words, without regard for conflict in testimony, without regard for anything, but a case, if submitted to your Honor for the sake of argument at the end of the plaintiff's case.

At the time of the October transaction, which is that which is challenged in this first count, what do we have?

We have Twin City Lumber Company holding warehouse receipts under the May agreement which wasn't challenged in the pleadings, it wasn't challenged in the Court this morning.

The main agreement, as the field warehouse set up the importance of that, your Honor, to this case is I think this: The purpose of the uniform [615] warehouse receipts act, the purpose of field warehousing is to create, to permit the creation for business purposes of liens upon personal property in compliance with the provisions of Section 3440 of the Civil Code regarding the immediate and continued change of possessions.

Great secrecy was laid in argument this morning upon the secrecy of this October transaction, the concealment if I may use counsel's word.

It is our position if your Honor please, that in October there was nothing to conceal; there was nothing of which notice either had to be given or even should be given.

The situation was this: That Twin City had warehouse receipts admittedly for its security. There isn't any real doubt if your Honor please, that it was to secure the entire transaction because Mr. Elliff's own testimony was that the October transaction and the warehouse account—and I quote his words—were one and the same thing.

There is no other testimony on that subject. The warehouse merchandise in October on the testimony of everybody was valid — was reason for the \$25,000.00.

At that time Elliff was indebted to Twin City in

the total sum of \$28,113.00. So that assuming that we are confined from a dollars and cents value for present consideration purposes, to \$25,000.00, Twin City Lumber Company was in effect unsecured for \$3100.00. [616]

What did we do; what transfers took place; what was done?

The warehouse receipts that we held invalid without notice—and I want your Honor to bear in mind that the creation of a field warehouse, the issuance of warehouse receipts is one of the several means provided by the California State Legislature for the creation of commercial liens upon personal property for security purposes without either the publication of notice as required under 3440 or under the Section 3017 and so forth.

We gave up those warehouse receipts pursuant to arrangement and Mrs. Lannin became in effect our successor on the warehouse receipts.

What assets of the bankrupt were transferred at that time? By the bankrupt, nothing. When your Honor reads the Uniform Fraudulent Conveyance Act which is the counterpart of it with minor exceptions, in our 3439 12 subdivisions, you will see, I am sure, that there has to be transfer of the bankrupt's property.

Now I concede in view of the state of the record that it is legally possible under those Sections to set aside an obligation conceived in fraud.

But as we have pointed out, that involves several things that are not present here. That involves the creation of an obligation for fraudulent purposes.

As I pointed out in our memorandum your Honor, we were unable despite I think reasonably arduous trial to find but one case in which an obligation as such was challenged under Fraudulent Conveyance statute and we have referred to that in our memorandum.

There was one sentence on the subject which I quoted in the memorandum. The substance of it is that that was intended. I mean that wording in Section 67 under the Uniform Fraudulent Conveyance Act was put in there to avoid bankruptcy for the purpose of enabling some friends, some co-conspirator to share in his estate, when actually such creditor had no such just claim, and therefore defeats and defies the other creditors of lawful participation in the exclusion of the fraudulent creditor. We don't have that here.

It seems to me your Honor, clear from the evidence. Mr. Elliff owed us \$28,116.00. And I say as a matter of law that at least \$25,000.00 of that was secured at the time.

But let us assume for the sake of argument with respect to the unsecured portion, or that it was all unsecured, which is not the fact, but let us assume it was all unsecured, what did he get? What did Twin City get as a result of the October transaction?

They got a note evidencing the exact amount of the indebtedness, the \$28,000.00. They got a [618] guarantee of a third person. There was no depletion of the estate because the only security that Mrs. Lannin got was the same security, whatever it was worth, that we had before.

In order, if your Honor please, to successfully attach an obligation or a transfer as a fraud, there must be fraud proven unless it comes within the subdivision A of Section 62 D too, wherein there is a lack of a fair consideration.

Fair consideration is defined, if your Honor please, in Section 67 D 1. It says "When in good faith in change and as a fair equivalent, therefore the property is transferred or an antecedent debt is satisfied."

Now we get to the situation that counsel discussed this morning as to the purpose of the note.

I say to your Honor, and I am sure you have excellent notes and recollection of the testimony, neither Mr. Elliff or anybody else in this Court testified that the note was intended to be given by him or to be received or accepted by Twin City as payment of anything.

That is a figment of the imagination of counsel based upon an inference that he would ask your Honor to draw.

Is it logical, is it good sound common sense? Is there anything fraudulent in connection with a person who was physical security for part of his debt when as we are conceding for the purpose of this argument his debtor is insolvent and when let's say he knew or ought to have known [619] that he was insolvent to obtain security of either additional security of the same kind or substitute some other security?

There is nothing fraudulent in that, in that there is nothing reprehensible. The Bankruptcy Act was

never designed to cover such a situation. Section 60 which is the basis of counts two and three, was designed to cover such a situation with an arbitrary form on limit.

Let's assume for the purpose of the argument that Elliff was insolvent in October and we knew it. And let us assume that we had either all or a partial unsecured possession of it. Mr. Hunter had closed the warehouse. I mean I am taking all of this testimony the way it was given for the plaintiff.

He wanted his money or else, or else of course, was the closing of the warehouse and ultimately possibly the liquidation of the warehouse. But the warehouse will be liquidated on testimony of everybody in this case.

We would have gotten \$25,000.00 worth of merchandise and we would have been unsecured for \$3,000.00.

But let us say we were all unsecured. What did we get? We got a guarantee, the guarantor got the security.

Let us assume that if we had even gotten direct security from the bankrupt in October of 1953 and that we didn't have before, and if no bankruptcy ensued within four months then all of the other circumstances of the case, under the law and [620] the decisions we have cited in the memorandum, your Honor, there is nothing fraudulent about it.

Judge Wilbur in the Ninth Circuit discussed that matter in the case that we cited. It is as close a situation to the existing facts with respect to a trustee's action for fraud as we were able to find.

I say it challenges credulity to ask your Honor to conclude that this note was intended by Elliff, whether it was accepted or not, as payment of anything.

The setup, the physical setup in the records of Twin City Lumber Company, your Honor, as shown by Exhibits K and F, Plaintiff's Exhibit 13, show clearly exactly what transpired. And counsel inadvertently stated something to your Honor when he said towards the latter part of his argument that the transaction on the warehouse account cleared the warehouse account, which is Plaintiffs' Exhibit 13, before the October transaction. Such is not the fact.

Exhibit 13 shows that as of August 31st there was a balance owing to Twin City on the warehouse account of \$25,468.29. Under date of September 21st, there was credited against that account the proceeds of the check that subsequently bounced \$7,310.98.

And on September 24th, the proceeds of another check that bounced \$741.26, leaving a balance as of September 24th on the account after giving effect to a check which had not [621] been returned of \$17,416.05.

That account your Honor, was by journal entry transferred to the notes receivable account, which is account number 117 B, which is part of Exhibit K, not prior to October 8th, or whatever date this trust agreement and note were procured.

Your Honor's examination of the notes receivable account, counsel says there was no note entered in

the books. As to an entry saying "Note dated so-and-so for so much money" no, there wasn't.

But as your Honor will read from Exhibit 117 B, it is headed "Notes receivable, Pine Supply Company." Therein it is entered—all of the items, the three bad checks, the third one being a \$2500.00 payment which was credited on the open account and which balanced the open account which is in evidence as Exhibit 4 and which was subsequently returned.

So that account was balanced by a bum check.

This account, the warehouse account was balanced—was reduced from \$25,000.00 to \$17,000.00 by two bum checks and was balanced out only by a journal entry, which is reflected here under the same date October 16th.

In other words, if your Honor please, it is also in our judgment a challenge to credulity to assume that the effect of this transaction as handled by us, forgetting Elliff's intentions, would have put us in a position where they could have at any time urged a claim for anything over \$28,000.00. [622] It just isn't possible.

Much is made your Honor, in an argument by counsel for the plaintiff of the fact that the three checks, three bad checks were not returned. The only explanation that was given was, I think the logical one, the reasonable one, namely that they were misplaced by Mr. Hunter. There is no evidence of any coercion. There was no evidence of any threats made in connection with the use of these bad checks. There is no evidence that the

checks were ever presented after the note was given or ever any payments made or attempted to be made on the checks.

What harm did the bankrupt estate suffer by reason of the fact that the three checks remained buried in a file, in a personal file by Mr. Hunter instead of being sent in the mail to Mr. Elliff? None whatsoever.

As far as adequate consideration for this note was concerned, the note is supported by not only the past consideration, the antecedent indebtedness to which I have referred, which includes all of the items of the \$28,000.00, but also current considerations.

First, the extension of the time of payment. The plaintiff concentrated in his evidence upon the fact that Twin City Lumber Company was pounding on Elliff's door very vigorously.

All the obligations up to the time of the notes was past [623] due. What happened as a result of our obtaining this note and getting the guarantee? Let us say the trust agreement too for the sake of argument.

We extended the time of payment or the first installment to February 1st of 1954. There is evidence to show your Honor that we subsequently agreed in writing to extend it beyond that to May and the balance of the \$28,000.00 was extended for a period I think of twenty-two months.

Certainly, an addition of time of payment where a debt is already past due is an ample current consideration. Furthermore, we gave up the ware-

house receipts. Now it is true, technically, as counsel argues, that the warehouse receipts were transferred in effect to Mrs. Lannin and that since they were security for her guarantee for the same obligation, that theoretically they were to our benefit. That is true.

Your Honor will recall that you stopped me at one point when I was attempting to emphasize or offer for the second time the fact that after October Twin City Lumber Company had no control whatever over the warehouse.

Your Honor stated that there is no evidence proving it. It was obvious. And it was obvious and that is exactly—that touches upon the circumstances of this transaction in the first instance.

This is exactly the situation that Elliff said—and [624] counsel quoted him correctly this morning—when he asked his mother-in-law to endorse this note he said, “I want to get the warehouse in more friendly hands.”

And the best evidence of the fact that he did get it in more friendly hands, that is, that the effect of it was to make it a lot easier for him was as the evidence showed that at the time of bankruptcy, there was only \$5,000.00 worth of security in the warehouse for Mrs. Lannin.

In other words, despite the fact that he bought \$15,000.00 worth of approximately new merchandise after October 8th, despite the fact that theoretically under the trust agreement twenty per cent of that was automatically held out for our own benefit, I mean, in connection with sales, despite

all of this, despite the fact that she got \$25,000.00 worth of security at the same time that we gave it up, she wound up with \$5,000.00 worth of security in the warehouse, which incidentally she lost to the trustee by virtue of a proceeding on its face appeared to be adversary, but actually it was not.

He got his warehouse into friendly hands. He was able, as your Honor heard testimony, he told Mr. Pasquinelli what to do in connection with non-payments and with Mr. Pasquinelli as his successor—your Honor heard the testimony that everything was done by Mr. Elliff and she went through.

The answer to that of course is, your Honor, that Elliff [625] got what he bargained for by the transaction and we got what we bargained for and we were entitled to get what we bargained for, namely a note guaranteed by Mrs. Lannin and Mr. Elliff got his warehouse into friendly hands.

There is nothing in connection with the transaction of October 8th that required under any statute of the State of California or of the United States that I know of, any notice to be given to creditors whatsoever.

And if Mr. Pasquinelli testified that he discussed the fact that notice might need be given, all I can say is that he must have concluded that it wasn't necessary, or at least that it wasn't advisable.

It might not have been advisable from Mr. Elliff's standpoint to give notice, if there was a way of giving notice, I don't know what you would do by giving notice about a transaction that isn't involved in the transfer of personal property or the stock in

trade of a merchant, the stock in trade of a merchant wasn't transferred in this deal or didn't purport to be. It was the warehouse receipts that were transferred.

Now counsel says from reading the transfer agreement that the trustee was to take and withhold twenty per cent of the gross receipts for the benefit of the secured creditor.

I ask your Honor to read the agreement and you will find that there is in there an express provision that is made for [626] the benefit of all creditors, not the twenty per cent agreement, the whole trust agreement is made for the benefit of all creditors.

Now what is fraudulent, what is required—what requires notice of any transaction which on its face is made for the benefit of everybody and it says so?

I am not interpolating, it's there in just so many words.

Now I am not going to spend any great amount of time on this phase of it because I don't think either from a legal or practical standpoint it is necessary. But I want to call your attention with respect to the credibility of the witnesses involved here and of part of counsel's argument to certain exhibits and the fallacy, the unreasonable conclusion that he asks your Honor to draw from the face of the record.

He has asked you to draw the conclusion and believe Mr. Elliff in connection with the Coast Range transaction, namely, that he told Mr. Hunter at the time of the May transaction which followed immediately the dissolution of the Pine Supply

partnership, that he owed one-sixth of \$70,000.00, in effect, on the old Coast Range Lumber Company deal.

As of April 7th which is a little less than a month before this transaction—we are reading from Defendant's Exhibit I—Coast Range is listed as an asset for \$9,000.00.

Now Mr. Hunter said that he called Elliff's attention to the fact that he didn't consider that worth anything because [627] he knew that Coast Range had been wiped out.

But is it consistent that at the same time that he gives, or immediately after he gives the man a statement showing an asset value of Coast Range for \$9,000.00 that states he told him that he was indebted for one-sixth of \$70,000.00 worth of indebtedness for Coast Range.

Again I say to your Honor that taxes the credulity. I would say indication of the inherent probability of certain phases of Mr. Elliff's testimony is disclosed by Defendant's Exhibit E which is the financial statement of Pine Supply Company submitted as of April 7th, 1953, the same date as the personal financial statement of Elliff, which shows a net worth of \$17,030.25.

The net worth of Elliff personally as shown by Defendant's Exhibit I on the same date is \$21,400.00. This is the same partnership, the same partnership which Mr. Baum testified as of May 20th when it was dissolved a month and 13 days later had a deficit, a capital deficit. And counsel

said it was large. He used the words "large," or its equivalent.

It actually showed a capital deficit of \$2,200.00.

I say to your Honor that the people who were defrauded in connection with representations as to assets value were Twin City Lumber Company, not Mr. Elliff.

Now counsel made the point this morning when Mr. Hunter was dissatisfied with that financial statement—and he bases [628] that statement upon the fact that Mr. Hunter through his correspondence repeatedly asked for current new personal and financial statements.

Your Honor knows from business experience, and counsel knows just as well as I do, that any creditor when he once relies on a financial statement continues to rely on it and is entitled to rely on it until he receives information from any source to the contrary.

Furthermore, it is common business practice to try to keep financial statements up to date to avoid the very situation that ensued here.

The evidence is also clear, your Honor, and admittedly by Elliff that Mr. Hunter never got those statements.

Now I pose this question to your Honor. Why didn't he get those statements? Why did he want them if he knew the condition?

He didn't get them because Mr. Elliff didn't want him to know it. I think that is a much more logical and reasonable interpretation of the facts of the evidence than that called for by counsel.

Now counsel used the expression that in effect Mr. Hunter said, "I don't care—" in the September conversation in San Francisco—"I don't care about anybody else, I want my money."

It is undisputed. He is right. Substantially, those [629] words were said. In that connection I say to your Honor there is nothing reprehensible, nothing fraudulent to delay creditors, nothing that makes voidable this transaction by reason of any such position of Mr. Hunter.

The authorities we have cited to your Honor, particularly again this Woodruff case supports exactly that theory.

Counsel is also, I think, confused in connection with what he says we ought to have known and that reasonable cause to believe means that it would have in effect put a reasonably prudent person upon guard and if he doesn't make that inquiry, he is chargeable.

I agree with that wholeheartedly, but that does not apply to Section 67 of the Fraudulent Conveyances that reason applies, if your Honor please, only to Section 60.

Again I refer to the memorandum to support that statement.

Under the decisions—and they go back to the original fraudulent conveyance and we have referred to them here. Under the law there must be in this case an actual intent.

And to use the words of the statute, "As distinguished from intent presumed in law." I am

reading from Section 67-D, 2 D, 67-D, 2 subdivision D.

It says, "As distinguished from intent presumed in law to hinder, to delay, or to defraud."

The cases are legion. They are cited in the memorandum.

In other words, with knowledge of insolvency on the part [630] of the transferee, if more than four months before bankruptcy not evidenced and does not constitute evidence of hindrance or delay—the cases I mean are clear on that point.

The cases are also clear, if your Honor please, upon the interpretation that to defraud, one must show actively by clear and convincing evidence not only that there was insolvency, insolvency alone at the time of the making of a conveyance and knowledge of insolvency on the part of the transferee is not sufficient by any standard or yardstick laid down by the courts to impute fraud.

In the first place, that statute said it cannot be inferred, it must be active. And in the second place in reasoning it out, as the courts have, they go further and say it must be by clear and convincing evidence.

It might be interesting just to point out in passing at this moment that in the complaint in this case, the first count, the arch conspirator, the architect of this devious scheme is definitely named by the plaintiff as Mr. Hunter.

The argument this morning, which is of course necessarily based upon the evidence in the case, now names Mr. Ramsay as the arch conspirator.

In other words, I think—and when your Honor reads that complaint, if you do again, I ask you to read it again respectively in the light of the evidence you heard and the argument which was made this morning by the plaintiff because [631] I think you will find that the complaint envisioned a situation which unfortunately for the plaintiff he was unable to prove in this case and he is now attempting by virtue of what I would call, shall we say, a tortuous argument with respect to the evidence to bring himself within a case, not the case that was pleaded, but a case of a fraudulent obligation.

If your Honor please, we also have a very interesting situation here which I comment on for reasons that would be obvious but also because your Honor addressed us jointly some time back with respect to the right to file claims in bankruptcy after the expiration of the six months period.

It is interesting to note that the plaintiff in this case seeks to have declared null and void—and I am quoting from his prayer in this complaint as to count one—the \$28,00000 note.

I ask your Honor how and in what way the estate of the bankrupt can be benefitted by the cancellation of that note when two things admittedly occurred?

First, the time for filing claims by us has expired and we never filed a claim on that note.

Two, Mrs. Lannin argues in the complaint that the estate might lose the warehouse—the \$5,000.00 worth of merchandise that was left in the ware-

house at the time of bankruptcy. They might lose that. That was in the complaint.

The evidence now shows from the decision of the Referee [632] that Mrs. Lannin lost that. The estate got that.

I say to your Honor that there is no possible benefit that can result to the bankrupt's estate by reason of setting aside this note with the single possible exception of the recovery if the note is invalid of the \$5,000.00.

Counsel might say, "Well, \$5,000.00 isn't hay, I mean, that's something."

But we have this situation. Section 57-N of the Bankruptcy Act, which we read to your Honor which provides that after the time for filing claims if a creditor who has not filed a claim within the six months, that means that he may then file a claim within thirty days after the judgment becomes final if the payment is made within fifty days.

If the note is set aside, as per the prayer of the complaint under the second count, he would recover \$5,000.00 from us. And how could we raise the \$5,000.00 back when it was paid under a note that your Honor would have declared under the first count to be invalid.

The Court: The \$5,000.00 you are talking about is the payments on the note?

Mr. Shapro: Yes, your Honor.

The Court: But the second asks for only \$5,000.00.

Mr. Shapro: No, your Honor, the second asks for \$2,500.00 as a preference. If you do not give

him preference on the first count to recover the \$5,000.00, its consistent— [633] I mean that phase of it is consistent with shall we say the law and the facts.

Now we have then, your Honor, the situation that the normal when and if—and I say with due deference to your Honor and I say with due deference to counsel with whom I had the pleasure of commencing the practice of law some twenty-eight years ago—that in my experience in bankruptcy Courts such as it may be I have never found where a trustee undertook to set aside *a* defeat a claim for an obligation at least until it was presented or became a threat to the estate.

In this case, this claim was never filed.

I also call your Honor's attention to the fact that Mrs. Lannin didn't file a claim based upon any liabilities that she might incur by reason of her obligation to us under the guarantee.

She filed a claim for sixteen-odd thousand dollars, which was admitted direct indebtedness from the bankrupt to her.

I called your Honor's attention once before to the fact that the cross-complaint in this case, the answer in cross-complaint was filed on the same date that the complaint was filed.

I also called your Honor's attention—and I do it with due deference to all parties concerned—to an examination of the paper of the typing and of the language in the cross [634] complaint and in the complaint in this case.

And I say to your Honor without fear of con-

tradiction that they were typed by the same typewriter and were dictated by the same man.

Now the interesting part of that observation, at least from our standpoint, your Honor, is this: To sue for a preference—in the first place to sue for the \$2,500.00 loan, you know, that was based on the note—after it was within the four months period—would avail the trustee, if successful of \$2,500.00 for the estate.

But if the note weren't set aside, it would put Twin City Lumber Company in a position to get that \$2,500.00 back from Mrs. Lannin because they guaranteed the whole amount.

The third count: Mrs. Lannin isn't involved in that, we are. As I said, in my memorandum in one paragraph, that is purely a question of fact and if your Honor believes we had reasonable cause to believe that Elliff was insolvent in March of 1954, when he obtained that money, the trustee is entitled to recover.

The only evidence which counters their inference they want you to draw, or reasonable cause to believe, is positive evidence. It's in the record here; namely, that in March of 1954 at the time we got the money, he was doing business on open account with very large plywood and lumber companies. And their invoices are here and his testimony was with Harbor [635] Plywood was \$7,000.00 on open account.

Your Honor will recall he admitted that on cross examination.

I also say to your Honor that if we were guilty

of the fraud that with which we are charged, if we had the knowledge, the intricate and replete and complete knowledge of the insolvent condition of Mr. Elliff in October of 1953, and if we participated with him, which is a necessary corollary of a recovery, there must be both fraudulent intent by the bankrupt and fraudulent intent by the transferee or the obligee, as in this case. They must be joint. One without another isn't enough unless the type of fraud by the transferee is sufficient that it would be imputed to the bankrupt, which even in this case I don't think is charged.

Under those conditions we gave him \$5,400.00 worth of new open account credit in November of 1954.

Now if your Honor from having seen Mr. Hunter, who is the boss of this concern, was and is, if your Honor believes that he looks like the kind of a man that if he knew all these things would give \$5,500.00 or \$5,400.00 on an open account credit after all that, then of course the evidence, the evidence to which I have addressed your Honor won't be persuasive.

But I don't think that your Honor can reach the conclusion, reasonably, that such was the fact. [636]

However, let us revert if I may for a moment, to the main thing.

Counsel started his argument this morning by saying that the salient fact, or one of the salient facts in this case was the trust agreement.

Now there is dispute in the evidence about our knowledge, our participation, our dictating the terms and so forth. But forget all that; forget

the conflict, resolve it for the sake of argument in favor of the plaintiff. There is nothing in the trust agreement, even if it was dictated by us and if we did everything concerning it that the plaintiff says we did, there is nothing fraudulent. There is nothing reprehensible. There is nothing voidable in connection with it.

All that was actually done—and I think the document speaks for it—I think all of the evidence really speaks for it, it was done in good faith by Mr. Elliff to protect his mother-in-law to the extent that he could in a guarantee that maybe he knew or maybe he didn't know might someday cause her grief, I mean, financial grief.

We have this situation stated by counsel that Mrs. Lannin gained nothing monetarily or otherwise by reason of this endorsement.

I will admit she gained nothing monetarily, but she gained something otherwise and she told your Honor what that something was. She gained peace of mind with her children. [637]

She testified—your Honor will recall it, I am sure—she knew his place, it looked like it would work itself out. She didn't want to refuse it and have it said afterwards that she might have saved the business, I mean by giving the guarantee if that she had refused it.

What more evidence your Honor, would the Court, want to show that the only reason for this guarantee was the family blood relationship between the mother and the daughter whose husband was the one finally involved, and that she knew

what she was doing, she knew there was some doubt about the wisdom of the financial standpoint.

That is confirmed most conclusively, we submit, by the fact that she said that if the business wasn't saved, she didn't want to be blamed for the fact that she might have saved it by giving the guarantee.

At no time have we contended, your Honor, that Mrs. Lannin participated in any fraud nor was she in bad faith in any respect. At no place have we said so and at no place have we urged.

She was victimized, but I don't think as contrary to counsel's views, I don't think Mrs. Lannin was victimized by her son-in-law by the act of fraud, the fraudulent misrepresentations which are contained in the cross complaint.

Again I respectfully ask your Honor to review, to re-read the cross complaint, the allegations in that cross complaint. [638] They were never proven in this case.

The allegations of that cross complaint were that he, Elliff, misrepresented to her his solvency and so forth and so on.

Your Honor will recall the testimony of Mr. Rubidoux. I mean I reserve motions to strike and so forth. I am not urging those motions because I am perfectly satisfied that the testimony is consistent with everything else in the case.

He said that he was told by Mr. Pasquinelli that there was in effect \$50,000.00 in assets and roughly \$40,000.00 in debts.

The testimony of Mr. Elliff is substantially the

same. The testimony of Mr. Baum is substantially the same. The testimony of Mr. Ramsay is substantially the same.

Much is made this morning about the fact that the tapes, the records, the notations, the records were destroyed, asking your Honor to presumably infer that there was something reprehensible in those, something damaging to the case of Twin City, and they were destroyed.

Mr. Ramsay's own testimony is confirmatory of the testimony given by the plaintiff as to the assets and liabilities on account, as reflected by the books and the tapes.

So I mean the fact that they were destroyed was just an incident to, shall we say, a certain amount of lenientness in a business office. That's all. [639]

Now counsel also made a point that the guarantor, or her attorney, were not present at the October 8th conferences. He urges that as an indication of the secretiveness of the thing. Such is not the fact, your Honor, because Mr. Rubidoux testified that he went over to Mr. Pasquinelli's office after the agreement was drawn up and he read it and he passed upon it and advised his client, Mrs. Lannin, to sign it.

Now if there was going to be a secret about it, the answer would have been shoved under her nose.

Now certainly anybody as competent as Mr. Rubidoux, is he going to pass upon it with respect to his client's rights? The secretiveness of this so-called trust agreement is vastly over-emphasized. It has

no bearing upon damage so far as the estate of the bankrupt is concerned.

When the October 8th transaction was completed, if your Honor please, the only thing that the Twin City Lumber Company had that they didn't have before is Mrs. Lannin's guarantee and that was of no damage to the estate, and in turn that he had given up control of the warehouse.

They didn't have a dime in an obligation that was coming to them and they didn't have the security tangibly, but they had a guarantee of a lady whose financial statement, as your Honor knows, which is in evidence, shows she is worth a quarter of a million dollars. [640]

There wouldn't be too much worry and it's much more logical and good sound business judgment to assume that the truth of Mr. Ramsay's testimony and the truth of Mr. Hunter's testimony, particularly the latter's, with respect to the financial statement that he wasn't interested in the trust agreement, he wasn't interested in the collateral as long as he had Mrs. Lannin's guarantee—and frankly your Honor I don't blame him.

On the subject of the second count, which I presume counsel has had an opportunity to read now, I didn't mail it to him yesterday because I knew they wouldn't get them so I delivered them first thing this morning.

The point we make there is that under the definition of secured creditor in Section 1 of the Bankruptcy Act, subdivision 28, Mrs. Lannin at the time of the \$2,500.00 payment, and on counsel's own

argument this morning, he informs me in that regard was secure credit because they as the guarantor of our obligation had collateral of the bankrupt to secure her guarantee.

That is exactly what the second sentence in this subdivision 28 of Section 1 says.

Now if she was a secured creditor at the time she received the \$2,500.00 within the four months, she cannot be preferred. I have cited to your Honor very briefly some sections in Collyer, which if you're interested and concerned, [641] can be expanded. I mean by that all you have to do is read about three or four pages beyond and three or four pages before the specific section of Collyer that I cited.

Your Honor will have a complete exposition of what I am sure is the law.

That a recoverable preference cannot exist where the transferee at the time of the receipt of the money, even though within the four months is secured, unless the payment would be transferred to him in excess of the fair market value of the security at the time.

Now when the \$2,500.00 was paid to Mrs. Lannin—I mean to Twin City for the bankrupt within the four months prior to bankruptcy, which is the subject of the second count, as far as the evidence shows the warehouse had substantial lumber in it.

The figure isn't in there but to offer—when a payment is made to a secured creditor and the trustee is to recover, that is a preference. It is the burden of the trustee to show that the asset value

of the security was less than the amount of the payment or the preferential transfer.

In other words, if the trustee had shown that at the time of the \$2,500.00 given to Twin City, the value of the merchandise in the warehouse on receipts held by Mrs. Lannin was less than \$2,500.00 to the extent of the difference between the actual value and the payment, it would be a recoverable [642] preference, all other things being equal.

But there is no evidence here that at the time the \$2,500.00 within the four months was paid on this note to Twin City Lumber Company; that Mrs. Lannin who was then secured by warehouse receipts was not adequately secured to the extent of the \$2,500.00 payments.

If as we say, as we urge, Mrs. Lannin was a secured creditor as specifically defined by subdivision 28 of Section 1 that it is not a recoverable preference because—the article that I do refer to calls it the diminution, the diminution of the estate.

It's the old system of double entry bookkeeping, the theory of a recoverable preference. That if there is security on this side of the ledger, a payment merely increases the security and releases the case.

The asset value of all assets of the debtor at the time remains the same because if she has a lien for \$2,500.00 on assets and the \$2,500.00 obligation is paid, the asset value of the security is eliminated.

The net result is that the estate gets the benefit of the discharge of the lien without a diminution

of the estate as a result of the preferential payment. It is not recoverable.

The third count, I have already referred to that, is a question of fact.

The fourth count, the question of damages penal and [643] otherwise, I of course agree that there is no statute or authority for this. This is purely a statutory action. This Court has no jurisdiction of this action except under Section 60, under Section 67, or under Section 70, 70 E, not 70 C.

70 C could only apply to the trustee, if at all, and that would give the Court no jurisdiction whatever as far as Mrs. Lannin's cross complaint is concerned.

I mean I am referring now to the damage phase of it because assuming for the sake of argument that under 70 C a claim for damages is possible for which there is no authority whatever—and I don't think from reading it your Honor will reach the conclusion that counsel will have you reach—but assuming it does, 70 C is only for the benefit of the estate.

It is not available for the benefit of Mrs. Lannin. No place have we run into a situation where damages for fraud allegedly committed in the form of the receipt of a voidable transfer, of a voidable obligation under the Uniform Fraudulent Conveyance Act or under Section 67, its counterpart, as we have indicated.

As I pointed out to your Honor the statute limits its challenge to the fraudulent transfer to say that the transfer is fraudulent and void. It doesn't

say anything about recovery after damages or recovery of anything else except [644] in effect to set aside a transfer.

Now counsel, referring just very briefly now to certain items, counsel said that Mr. Elliff testified that the \$1,200.00 check, which was one of the items of the preference in the fourth count—the one in the third count that was added by the amendment, that is balanced and is protested.

He didn't testify that it was protested. There is no evidence that it was protested. Mrs. Swanson's testimony was that it never was returned. That's just an item.

If as we said before—and I am using counsel's words—if we received in October additional security for the note—I am using his words of this morning—"That is not fraudulent; that is not voidable because it took place more than four months before bankruptcy."

Again assuming that we knew about all his insolvency and that he was insolvent.

The Court: May I ask this question while you are on the subject of the third count?

Mr. Shapro: Yes, your Honor.

The Court: By reason of the amendment that was filed, assuming for the moment that everything the plaintiff contends the Court finds in this third count, what would be the amount——

Mr. C. Huntington Jacobs: Thirty-six hundred dollars and some odd. [645]

The Court: \$3616.00.

Mr. Shapro: \$4816.52.

The Court: That is the figure I have here.

But you spoke of the \$1200.00. Is there some difference between the \$1200.00 item and the items of three one seven oh and three four six?

Mr. C. Huntington Jacobs: No, your Honor. That was one—counsel explained at the beginning of the case that he wasn't sure it was preferences when the suit was filed. He developed some more information and then decided to add it.

The only reason he even mentions it in this argument now——

The Court: It is in exactly the same category as the other three? The only reason I mention it is because counsel made a point that the \$1200.00 check bounced as late as April of 1954. That check never bounced. And counsel said there was evidence that it had been protested. The protests are in evidence. They are Exhibit 16. They show that we have talked about it, you know that part, \$28,000.00 note. They show three earlier checks. How did the \$1200.00 then become an item that was paid?

Mr. Shapro: Oh yes, that was paid. We received the money. There was no controversy on that score at all.

In conclusion your Honor, I want to say to the Court in all candor and sincerity that the plaintiff as far as the [646] estate of the bankrupt is concerned—and that is all that the plaintiff is interested in, the plaintiff is a trustee in bankruptcy—incidentally, off the record, I might state to your Honor that Mr. Williams the trustee is a gentleman of the highest repute for whom I have the privilege

of acting in many, many cases many times, the last case I tried before you, Williams was the plaintiff, remember, against Minardee.

The only thing that the trustee is interested in and can legally be interested in something which adversely affects it. It is a statutory right. It is limited by the statutes.

If you go back to the common law, you don't find any difference. The cases I have been citing go back to 1817 in which the same yardstick is still employed where there was either current or past consideration for both there can be no fraudulent conveyance except actually as distinguished from inferred fraud, intent to hinder or delay or defraud creditors.

We submit if your Honor please, ordinary prudent common business judgment, good law, sound common sense indicates that there was nothing done by Twin City Lumber Company in connection with this promissory note that was remotely reprehensible, let alone sufficient to charge them with and label them as the recipients of and participants in an active deliberate fraud upon the estate.

The estate of the bankrupt suffered no damage whatever. [647] The indebtedness remained the same. The security was available to the bankrupt and the creditors of the bankrupt as I have pointed out to your Honor for the trust agreement was made for the benefit as well as for ours.

Mr. C. Huntington Jacobs: Do you wish me to reply?

The Court: I will give you such time as you desire.

Mr. C. Huntington Jacobs: That is very kind of your Honor. I do want an opportunity to do that. Do you care to have me reply now?

The Court: Yes.

Mr. C. Huntington Jacobs: I will try to make this just as brief as I can. I want to leave the fourth count behind us for your Honor's consideration with just this remark.

The Court has jurisdiction unquestionably of the subject matter of the first three counts. The fourth count is related to the first three.

This is a court of equity and the court of equity customarily disposes, once it has jurisdiction of the subject matter, customarily disposes of the entire controversy.

I see no difficulty in the Court disposing of the controversy insofar as it takes the form of the fourth count since it has the unquestioned jurisdiction of the subject matter in the form which it takes in the first three counts.

Now in respect of this distinction which counsel makes between the second count and the third, it seems to me is [648] begging the question.

In the first place if the note was fraudulent as contended by the trustee, if the note was fraudulent and void, of course that there argument falls to the ground and becomes unimportant anyway because the amounts paid on the note are recoverable under the first count.

It is in evidence that in the proceedings in which

Mrs. Lannin sought to assert her claim the claim was unfounded. Her lien was denied. Her adverse claim was denied. The net result is that she didn't actually have any lien and hasn't got one now.

She did intend at the beginning of this case, and is still contending, formally, that she had a lien. But actually the decision was that she had none. That was the decision of the Referee and that is in evidence and the reasons are stated in his order.

Now when he says that she was a secured creditor, he ought to have added contingent creditor. She was a secured contingent creditor if that note was valid. If it wasn't then her guarantee was not valid either because her guarantee was collateral to the obligation of the note.

And consequently when \$2500.00 was paid on that note, there was as clear as possible a preference, not only to Mrs. Lannin but also to the payee of the note; that is to say, its successor, Twin City Lumber Company, or so it seems to me. [649]

I think however that that question is of secondary significance because I honestly feel that upon examining the record in this case—and your Honor's notes which I know are very carefully kept—your Honor will very probably agree with the contentions of the trustee that this transaction was fraudulent from every point of view.

Now Mr. Collyer disagrees. I think I have cited his comment in the memorandum in discussing what fraud is necessary to entitle the trustee to recover under Section 67 D to a case of actual fraud.

And we are not limiting ourselves to actual fraud

either. I will agree right now. Mr. Collyer takes the position, as I think your Honor will find upon reading his comment, that if an actually fraudulent intent existed on the part of the bankrupt, on the part of the transferer that is, or obliger, it is utterly immaterial whether it also existed on the part of the transferee or obligee.

That point I think is covered in our memorandum. I haven't in the memorandum that I submitted drawn as extensively into the cases that are cited by Mr. Collyer as counsel has and in his reply.

But if your Honor reads Mr. Collyer's comment upon these matters I think Mr. Collyer is a matter of convenience. We all know what the situation is there.

I believe that you will find that the first count of this [650] complaint is solidly supported by authority in view of the evidence in this case. I was very much surprised to hear this appraisal that was given your Honor of this trust agreement.

Counsel says he can find nothing fraudulent about it. He says he can find nothing wrong about it. He finds it quite all right that the agreement provided in effect for the payment of one obligation or purported obligation at the expense of new creditors who must necessarily be brought into the picture and left unpaid because of the appropriation of twenty per cent of the proceeds of this losing business to be payment of that purported obligation.

He also surprised me when he mentioned the proposition that Section 67 D was intended to cover only fictitious obligations. I don't know what au-

thority he could possibly deduce from such a proposition. The statute speaks for itself.

It very sensibly brackets as one and the same category transfers of material things and the incurrance of obligations by a bankrupt, I mean by a debtor.

And so does the Uniform Fraudulent Conveyance Act exactly the same way.

He surprised me again when he referred at first to Mr. Elliff's intentions that the note should be received in payment as a figment of imagination of myself. [651]

But how can that be said when your Honor has before your Honor an exhibit which was put in this case by the defendant, by the defense itself, showing that that was his intent unmistakably because in that letter he conditions the theory or try to have the note upon the return of these unpaid checks aggregating over \$9000.00 and comprising more than one third of the total antecedent indebtedness.

What else can he intend? How did he suppose he was to be entitled to the return of those checks if this note was to be accepted as security for the payment of those checks or the amount that they represented.

It is perfectly apparent what he intended and if my memory doesn't fail me completely, and if my notes are not wrong, he testified what he intended by the discussion of that note and Mr. Baum testified how the total of the note was arrived at and why the excess claimed by Twin City was paid in cash over and above this amount of \$28,000.00, and

that payment and this note are obviously intended to wipe the slate clean except for the note itself.

That was not the intent of Twin City or it was their intent at the time that the note was executed, it certainly was not at the time the note reached them.

They never did receive this payment and I am glad to hear that admission.

But now we are told that the checks, the reason for the [652] non return of the checks was merely that they were mislaid. Isn't that entirely inconsistent with counsel's position that the note was never intended to operate this payment?

It seems to me that there is a clear conclusion there between two opposite views by one and the same party.

What was this extension of time to which counsel refers? There is nothing in writing about it, nothing in evidence about it. It is an inference drawn from the fact that they took no action actually after they had gotten this guaranteed note with the present security of everything that the man had substantially or very nearly everything and it as an insurance of future security of receiving his future security of everything substantially that he might acquire in a business way thereafter.

Is there an extension of time implied there, that he could have actually filed an action against him so far as anything in this evidence shows?

Insofar as I can see, they could have filed an action against him the day after that October transaction was made if they had wanted to on these old

obligations which they had kept alive or they could have waited if they wished until the note came due and then filed an action against him.

Instead of that you will recall my asking Mr. Hunter "Do you expect payment entirely and exclusively from Mrs. Lannin?" [653]

And he said, "Why, no, we expected to get paid by Elliff as long as he stayed in business."

That was the substance of what he said. I think the record will bear me out.

Of course they didn't want to pursue Mrs. Lannin—to sue Mrs. Lannin unless they had to. It was much pleasanter and much more feasible to get the money from the business as long as Mr. Elliff could continue in business by incurring obligations which he could not pay.

There are many other matters that I have noted down, but it would take too long to cover them.

I do want to mention one thing to which I have already alluded in my reply.

Our complaint shows that we rely in this first count not merely upon actual fraud but upon constructive fraud designed by the Bankruptcy Act and also by the Uniform Fraudulent Conveyance Act.

Our memorandum deals with that matter and adverts to the witnesses whose testimony appeared to support the present.

It is our contention that there is present in this case all of the elements required by each of those three definitions. They are alternatives.

If any one of them be found there was construc-

tive fraud, and of course if there was constructive fraud it is immaterial whether there was actual fraud or not, but we have laid stress [654] upon the actual fraud in this case because it seems to us that there seldom has been a case that affords more evidence of an intent to hinder or delay or to defraud and they all come under the heading of fraud under the Bankruptcy Act and under the Uniform Fraudulent Conveyance Act.

It isn't necessary that the bankrupt should have intended never to pay the obligation at all. It is quite sufficient that he intended to hinder or delay the creditor in realizing upon this obligation.

If this was his intent, it is just as fraudulent as though he never intended to pay that creditor at all.

But I call your Honor's attention to the testimony of the bankrupt which is absolutely unrefuted to this effect, that he incurred after that October transaction for the purpose of merchandise for his stock in trade from other suppliers than Twin City Company or Twin City Lumber Company, he incurred indebtedness aggregating approximately \$40,000.00 of which he paid only approximately \$8000.00, one fifth.

The other four fifths, what happened to that? It either vanished in the continued operation of that business, the expense of it, of which eighty per cent of its proceeds were, the entire proceeds might have been allocated, or else it was paid to Twin City Lumber Company on account of this note while the creditors who had supplied the merchandise from which this money was derived by virtue of this ut-

terly [655] innocent document, this trust agreement, remained unpaid and remained unpaid today. Thank you.

Mr. Shapro: May I have just one word, your Honor?

The Court: Yes.

Mr. Shapro: We do not contend that this note was given to us or received by us as security for anything. It was a written evidence of the indebtedness and the old accounts were closed and the old account was opened on that basis.

The word security as counsel used it imports some lien upon the property of the bankrupt. That we didn't have for—such is not our contention as and as far as the innocent document which he refers to, he said the bankrupt incurred \$40,000.00 worth of obligations, if we got our twenty per cent of it we would have gotten \$8000.00 on the note.

In other words, if your Honor please, we were supposed to anticipate in October despite the fact that in November we gave him \$5400.00 worth of new merchandise, that he was going to buy \$40,000.00 new merchandise on open account with no credit at all of being insolvent and only pay twelve of it—in other words, we were supposed to be sued, I don't think it's reasonable.

The Court: Well, the matter may be submitted. I want to read these memorandums again.

[Endorsed]: Filed July 23, 1956.

[Endorsed]: No. 15201. United States Court of Appeals for the Ninth Circuit. Ralph E. Williams, as Trustee in Bankruptcy of the Estate of George F. Elliff, an individual doing business as Pine Supply Co., bankrupt, and Pearl K. Lannin, Appellants, vs. Twin City Company, Twin City Lumber Co., John W. Hunter, Franklin Supply Corporation, Southwest Management Corp., H. A. Collins and William R. Ramsay, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: July 10, 1956.

Docketed: July 23, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Circuit Court of Appeals,
in and for the Ninth Circuit

No. 15201

RALPH E. WILLIAMS, as Trustee in Bankruptcy of the Estate of GEORGE F. ELLIFF, an individual, doing business as "PINE SUPPLY CO.," Bankrupt, and PEARL K. LAN-
NIN, Appellants,

vs.

TWIN CITY COMPANY, TWIN CITY LUMBER CO.; JOHN W. HUNTER; FRANKLIN SUPPLY CORP.; a corporation; SOUTHWEST MANAGEMENT CORP., a corporation; H. A. COLLINS and WILLIAM W. RAMSAY, Appellees.

SPECIFICATION OF POINTS

Appellants specify as follows the points upon which they rely upon this appeal; to-wit:

1. In view of the pleadings and the evidence, the District Court should have found the October transaction mentioned in the First and Fourth Counts of the Complaint and Cross-Complaint constructively fraudulent under subsection 2, of subdivision d, of section 67, of the Bankruptcy Act and under each of the first three clauses of that subsection; namely, clauses (a), (b), and (c).

2. In view of the pleadings and the evidence, the District Court should have found the said October

transaction constructively fraudulent under sections 3439.04, 3439.05, and 3439.06 of the Uniform Fraudulent Conveyance Act of California (namely Cal. Civil Code, secs. 3439.04-3439.06).

3. In view of the pleadings and the evidence, the district Court should have found the October transaction, mentioned in the Complaint and Cross-Complaint, actually fraudulent under clause (d) of subsection 2, of subdivision d, of section 67 of the Bankruptcy Act.

4. In view of the pleadings and the evidence, the District Court should have found the said October transaction actually fraudulent under section 3439.07 of the said Uniform Fraudulent Conveyance Act of California.

5. The District Court should therefore have found the promissory note involved in said transaction fraudulent and void as against the creditors of the bankrupt and his trustee in bankruptcy under subsection (6) of subdivision d, of section 67, and under subsections (1) and (2) of subdivision e of section 70, of the Bankruptcy Act.

6. The appellant Trustee further specifies that the District Court should therefore have found fraudulent and void as against the Trustee, each and all of the transfers made by the bankrupt from his estate as payments upon said note, and should have concluded and held that all of said payments made prior to (besides those made during) the period of four months next preceding bankruptcy, were recoverable as fraudulent transfers under subsection (6) of subdivision d of section 67, and under

subsection 2 of subdivision e of section 70, of the Bankruptcy Act; and further specifies that he should have been awarded judgment accordingly upon his First Count.

7. The appellant Trustee further specifies that the District Court should have found that the estate of said bankrupt was impaired as a proximate result of such fraud on the part of the appellees, in the manner and to the extent alleged in the Fourth Count of the Complaint, and should have concluded and held that on behalf of the creditors the trustee was entitled to recover from the appellees and each of them the amount of such impairment; and further specifies that he should have been awarded judgment accordingly upon his Fourth Count.

8. The appellant cross-complainant, Pearl K. Lannin, further specifies that the said note being void as fraudulent, was and is wholly unenforceable even as against the maker, and that the District Court should therefore have found, concluded and declared her accommodation guarantee of said note to be equally void and unenforceable as against her in accordance with the prayer of her cross-complaint.

9. The appellant cross-complainant, Pearl K. Lannin, further specifies that the District Court should have found she had been actually damaged in the manner and to the extent alleged in her cross-complaint as a proximate result of such fraud on the part of the appellees, and should have concluded and held that she was entitled to recover the amount of such actual damage plus such exemplary

damage as the Court might deem appropriate within the prayer of her Cross-Complaint, and that she should have been awarded such actual and exemplary damages.

Dated: September 17, 1956.

Respectfully submitted,

/s/ C. HUNTINGTON JACOBS,
Attorney for Appellant Trustee,
Ralph E. Williams

/s/ ROBERT N. JACOBS,
Attorney for Appellant Cross-
Complainant, Pearl K. Lan-
nin

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Sept. 18, 1956. Paul P. O'Brien, Clerk.

the
night
of
the
day
of

No. 15,201

United States Court of Appeals
For the Ninth Circuit

RALPH E. WILLIAMS, as Trustee in Bankruptcy of the Estate of George F. Elliff, an individual doing business as Pine Supply Co., bankrupt, and PEARL K. LANNIN,

Appellants,

VS.

TWIN CITY COMPANY, TWIN CITY LUMBER Co., JOHN W. HUNTER, FRANKLIN SUPPLY CORPORATION, SOUTHWEST MANAGEMENT CORP., H. A. COLLINS, and WILLIAM R. RAMSAY,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

Honorable O. D. Hamlin, Judge.

APPELLANTS' OPENING BRIEF.

C. HUNTINGTON JACOBS,

DANIEL R. COWANS,

Bank of America Building, San Jose, California,

Attorneys for Appellant

Ralph E. Williams.

ROBERT N. JACOBS,

Bank of America Building, San Jose, California,

Attorney for Appellant

Pearl K. Lannin.

FILE

JUL 22 1957

1957

PAUL P. O'BRIEN, C.

Subject Index

	Page
Legal proceedings to date	1
Statement of facts	3
Legal issues	6
Argument	7

I.

Introduction	7
--------------------	---

II.

The October transaction is a fraudulent conveyance under the provisions of Bankruptcy Act Section 67d 2(d) and under California Civil Code Section 3439.07	9
--	---

III.

The October transaction is a fraudulent conveyance under the provisions of Bankruptcy Act Section 67d 2(b) and California Civil Code Section 3439.05	12
--	----

IV.

The October transaction is a fraudulent conveyance under Bankruptcy Act Section 67d 2(a) and California Civil Code Section 3439.04	15
Conclusion	18

Table of Authorities Cited

Cases	Pages
Com. Trust Co. of Pittsburgh v. Cirigliano, 352 Pa. 108, 41 A.2d 863	11
Heath v. Helmick (1949), USCA 9th, 173 F.2d 157	11
In re Cummins Const. Corp. (1948 USDC Md.) 81 Supp. 193	11
Kane v. Sesac Inc. (1944 USDC N.Y.) 54 F. Supp. 193	11
Lovett v. Fairecloth, 10 F.2d 301	9
M & N Freight Lines v. Kimbel Lines, 180 Tenn. 1, 170 S.W.2d 186	9
Menick v. Goldy, 131 C.A.2d 542, 280 P.2d 844	11
Rose v. Rose, 271 N.Y.S. 5, 241 App. Div. 3	9

Statutes

Bankruptcy Act:

Section 67	6, 9
Section 67d 1(e)	14
Section 67d 2(a)	15
Section 67d 2(b)	12
Section 67d 2(d)	9

California Civil Code:

Section 2854	15
Section 3439	6, 9
Section 3439.04	15
Section 3439.07	9
Section 3440	5

Statute of 13 Elizabeth	9
-------------------------------	---

No. 15,201

United States Court of Appeals For the Ninth Circuit

RALPH E. WILLIAMS, as Trustee in Bankruptcy of the Estate of George F. Elliff, an individual doing business as Pine Supply Co., bankrupt, and PEARL K. LANNIN,

Appellants,

vs.

TWIN CITY COMPANY, TWIN CITY LUMBER Co., JOHN W. HUNTER, FRANKLIN SUPPLY CORPORATION, SOUTHWEST MANAGEMENT CORP., H. A. COLLINS, and WILLIAM R. RAMSAY,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

Honorable O. D. Hamlin, Judge.

APPELLANTS' OPENING BRIEF.

LEGAL PROCEEDINGS TO DATE.

On July 10, 1954, in the United States District Court for the Northern District of California, Southern Division, one of the creditors of George F. Elliff herein called the Bankrupt, filed a petition for the

involuntary adjudication of said Elliff. Thereupon the said Court adjudged said George F. Elliff to be a Bankrupt and appointed Ralph E. Williams as Trustee in Bankruptcy. The Trustee thereafter instituted summary proceedings against Pearl K. Lannin, who claimed ownership of the stock in trade located in the Bankrupt's place of business, by virtue of warehouse receipts issued to her pursuant to the "Trust Agreement," a copy of which was made an exhibit to the complaint herein. Pearl K. Lannin attempted, by petition, in said summary proceedings, to join Twin City Lumber Company, defendant herein, and an order joining Twin City Lumber Company was made. Motion was thereupon made by Twin City Lumber Company, to dissolve the joinder and dismiss the proceeding as against itself, and the motion was granted. Subsequent thereto the said summary proceedings were concluded with an order denying the claim of Pearl K. Lannin to the Bankrupt's stock in trade and concluding that the said Trust Agreement and warehouse receipts were wholly ineffectual and void as against the Trustee. This order was made subsequent to the filing of the action upon which this appeal is made, but prior to the trial thereof.

The action herein was brought by the said Trustee in Bankruptcy against Twin City Lumber Company, Twin City Co., John W. Hunter, Franklin Supply Corporation, Southwest Management Corp., H. A. Collins and William R. Ramsay (grouped for convenience hereafter as the Twin City defendants), and

against Pearl K. Lannin and Audrey Mae Elliff, based upon a complaint setting forth four counts therein. Pearl K. Lannin thereupon cross-complained against the Twin City defendants.

Trial was duly held before the Court, sitting without a jury, and judgment was rendered for the trustee against the Twin City defendants on Count Three of his complaint, and against the Trustee on Counts One, Two and Four of his complaint. Judgment was also rendered against Pearl K. Lannin on her cross-complaint.

This Appeal is now taken by the Trustee on the judgment against the Trustee on Counts One and Four of his complaint, and by Pearl K. Lannin on the judgment against her on her cross-complaint.

STATEMENT OF FACTS.

In 1953 George Elliff, the Bankrupt was engaged in the retail lumber business in the city of San Jose. He purchased a large part of his stock in trade from Twin City Lumber Co. a Los Angeles wholesaler. All of the respondents in this case are similarly situated as to their legal position in this case and for purposes of convenience hereinafter they will be referred to simply as Respondent unless specifically referred to by proper name. Due to the Bankrupt's poor record of payment an agreement was made whereby the Bankrupt's stock in trade was put into a field warehouse on his premises and as security for the obliga-

tion to it Respondent was given the warehouse receipts. This took place in May and gave Respondent as a practical matter the power to prevent the Bankrupt from continuing in business.

Subsequent to this the Bankrupt continued in business but issued bad checks to Respondent in payment of obligations to it and finally Respondent informed the Bankrupt that he would either have to pay the obligations or else some new and more satisfactory arrangement would be necessary to prevent Respondent from closing down the business which the respondent did close prior to the October Transaction. Respondent visited the Bankrupt in San Jose and went over his affairs in detail although it appears that the Bankrupt may not have disclosed to Respondent some non-business debts he had. After conferences and discussions in late September and early October the Bankrupt made a small cash payment, executed a note for \$28,000 to Respondent and concluded a Trust Agreement whereby the Bankrupt transferred his stock in trade and assigned his accounts receivable in trust to his attorney as trustee. He also undertook an obligation as stated in the Trust Agreement to transfer all future stock in trade whether or not purchased from Respondent and to assign all future accounts receivable to the trust. The stock in trade had a value of some \$25,000 and the accounts receivable were in the amount of \$25,000 although listed in the trust agreement as \$17,000. Respondent turned over its warehouse receipts to the warehouse company and new ones were issued to Pearl K. Lannin, the Bank-

rupt's mother-in-law. Mrs. Lannin guaranteed the Bankrupt's note to Respondent. Respondent did not give up its warehouse receipts until it had received copies of the note and trust agreement and a financial statement of Mrs. Lannin.

The trust agreement named Mrs. Lannin as beneficiary but it also provided that 20% of all receipts of the trust were to be set aside for Respondent to make payments on the note. It provided for a salary to the Bankrupt and permitted the trustee to make payments to other creditors but provided that in no event should any payments be made that would touch the 20% for Respondent.

At the conferences in San Jose previously mentioned Respondent sought to have the figure of 30% set aside for his benefit but finally settled on 20%. At one of the conferences in the offices of the attorney who became the trustee, the attorney mentioned the possibility that a notice to creditors under the provisions of California Civil Code Section 3440 might be necessary. The matter was discussed and it was agreed that notice might be disastrous and should not be given. Respondent's agent stated that he took no part in that phase of the discussion but admitted knowledge of it.

Although the Bankrupt had transferred title to his business he continued to run it as the Trust Agreement provided he should do Respondent had permitted the reopening of the Bankrupt's business upon the completion of the October Transaction. Creditors of the Bankrupt at the time of the October transac-

tion remained creditors at the time of bankruptcy and held and hold provable claims against the Bankrupt. Pursuant to that transaction payments were made to Respondent. Bankruptcy occurred the following June.

In the bankruptcy proceedings, the Referee held that the October transaction was a fraudulent conveyance under Section 67d as to the creditors of the Bankrupt, and thus held that Mrs. Lannin obtained no rights under it.

LEGAL ISSUES.

1. Did the Bankrupt have an actual intent to hinder, to delay or to defraud any of his creditors by means of the October transaction?
2. Did the Bankrupt transfer any property or incur any obligations to or for the benefit of Respondent under the October transaction?
3. Was the property remaining in the hands of the Bankrupt after such transfer or obligation an unreasonably small capital for his business?
4. Was the Bankrupt insolvent at the time of the October transaction or rendered insolvent thereby?
5. Did the Respondent give the Bankrupt fair consideration as defined by Section 67 of the Bankruptcy Act or California Civil Code Section 3439?
6. Does the fraudulent character of the transaction of which it was a part, render the promissory note invalid and unenforceable against the Bankrupt, and therefore the guarantor?

ARGUMENT.

I.

INTRODUCTION.

The efforts of creditors to collect from their debtors and the efforts of debtors, honest and otherwise, to escape or to delay payment have produced a substantial segment of law. As the efforts of debtors became recognized and stereotyped, laws were passed to prevent or limit their methods. As new ways were fashioned by debtors to sidestep these laws new statutes were developed to counter the action of the debtors. This field of law is a dynamic one as ingenious debtors impelled by the threat or the existence of insolvency try to salvage something for themselves and lawmakers strive to keep these efforts within the bounds of our concepts of fairness and justice.

At times the debtor feels, rightly or wrongly, that a respite from his difficulties, temporary though it may be can be gained by giving a special favor to a certain creditor or creditors. Customarily the favored creditors are those who are most insistent in their threats or those who are in position to do the Bankrupt's business the most harm. The action favoring the creditor may be solely the Bankrupt's idea but it often results from the collusion or at least the strong suggestion of the creditor. Many of these efforts at favoritism are not permissible as being unfair to the debtor's other creditors.

The relationships of debtors and creditors are prescribed and circumscribed by many laws. Among them are laws relating to bankruptcy, bulk sales, ob-

tained and perfecting security devices such as mortgages, pledges and warehouse receipts and the laws relating to various types of liens. Also included are statutes covering what are perhaps unfortunately entitled "fraudulent conveyances." It is misleading to use the word "fraudulent" which often connotes conduct bordering on the criminal to describe conduct in which by the express words of the statute, actual intent may be immaterial. An honest effort to pay an honest debt may under the statutes be a fraudulent conveyance. It is nevertheless forbidden as unfair to other creditors just as similar honest efforts to pay honest debts may be forbidden as preferences.

In the instant case the Respondent was a creditor who was in a position to do the Bankrupt's business great harm. It insisted that some arrangement satisfactory to it be made and ordered the Bankrupt to cease to operate until that time. An arrangement was made which gave Respondent a favored position unavailable to other creditors. The trial court agreed that this conduct was unfair to other creditors to the extent that money paid pursuant to the October agreement and within 4 months of bankruptcy was a preference. It failed to find that the transfers and the obligations under which that money was preferentially paid were "fraudulent conveyances." This was error.

This is a case of first impression on some of the phases of the law concerned. Our research has turned up very little authority on the questions involved.

II.

THE OCTOBER TRANSACTION IS A FRAUDULENT CONVEYANCE UNDER THE PROVISIONS OF BANKRUPTCY ACT SECTION 67d 2(d) AND UNDER CALIFORNIA CIVIL CODE SECTION 3439.07.

The Uniform Fraudulent Conveyance Act based upon the old Statute of 13 Elizabeth is the source of the provisions of both Section 67d of the Bankruptcy Act and Section 3439 of the California Civil Code. The trustee has the right to assert a claim under both. As the corresponding subsections are virtually identical in language the arguments to be made will be applicable under both statutes.

Section 67d 2(d) of the Bankruptcy Act reads:

“Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this act by or against him is fraudulent as to then existing and future creditors if made or incurred with actual intent as distinguished from intent presumed in law to hinder, delay or defraud either existing or future creditors.”

The Bankrupt had an actual intent to hinder and to delay his creditors in this case. The proof of intention to hinder or delay is proof of actual fraud required by the section. *Lovett v. Faircloth*, 10 F.2d 301; *Rose v. Rose*, 271 N.Y.S. 5, 241 App. Div. 3; *M & N Freight Lines v. Kimbel Lines*, 180 Tenn. 1, 170 S.W.2d 186.

The intent to hinder and to delay was shown by evidence of a determination to withhold from other

creditors of the bankrupt, present or future and notice of the October transaction. Without prolonging this brief with extensive quotations from the Transcript of Record we respectfully call the courts attention to the fact that a conversation took place in early October at the offices of Louis Pasquinelli Esq. attorney for the Bankrupt at which Mr. Pasquinelli, Mr. Baum the Bankrupt's accountant, the Bankrupt and Mr. Ramsay, one of the Respondents were present. At that conversation the matter of notice to creditors was suggested as necessary by Mr. Pasquinelli. After a discussion in which it was pointed out that such notice might be disastrous it was agreed that no notice be given. (Testimony of Pasquinelli Tr. Rec. p. 147; of the Bankrupt Tr. Rec. p. 176; of accountant Baum Tr. Rec. p. 251 and of Respondent Ramsay Tr. Rec. p. 528.) Respondent Ramsay admits that there was such a conversation in his presence but although he admitted his memory was not too clear on the details of the October transaction he did deny that he took an active part in that phase of the conversation. The others present remembered otherwise. However there is apparently no dispute of the fact that Respondents closed the Bankrupts operation down and told him some satisfactory arrangement had to be made on the debt, that Respondent knew of the conversation described above at which it was determined that notice would not be given, that the Trust Agreement contained a provision that future accounts receivable would be turned over to the trust and no

notice given to the debtors thereon, and that Respondents did not release the warehouse receipts they held until receiving executed copies of the note and Trust Agreement.

It is clear and unmistakable that the Bankrupt intended to hinder and delay his creditors, existing and future by concealing from them the facts of the October transaction and that Respondent had a similar intent. While there is no direct admission of the fraudulent intent by Respondent proof of fraud may come by inference from circumstances surrounding the transaction, the relationship and interest of the parties. *Menick v. Goldy*, 131 C.A.2d 542; 280 P.2d 844. Thus Finding of Fact IX of the court below is in error as it is contrary to undisputed evidence.

One final factor should be noted. The substance of this transaction was that the Bankrupt transferred title to his business and assets and yet retained benefits and practical control. This has always been regarded as fraudulent. *Heath v. Helmick* (1949), USCA 9th, 173 F.2d 157; *In re Cummins Const. Corp.* (1948 USDC Md.) 81 F. Supp. 193; *Kane v. Sesac Inc.* (1944 USDC N.Y.) 54 F. Supp. 193; *Com. Trust Co. of Pittsburgh v. Cirigliano*, 352 Pa. 108, 41 A.2d 863.

III.

THE OCTOBER TRANSACTION IS A FRAUDULENT CONVEYANCE UNDER THE PROVISIONS OF BANKRUPTCY ACT SECTION 67d 2(b) AND CALIFORNIA CIVIL CODE SECTION 3439.05.

Section 67d 2(b) provides:

“Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent as to the existing creditors and as to other persons who become creditors during the continuance of a business or transaction if made or incurred without fair consideration by a debtor who is engaged or who is about to engage in such business or transaction for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent.”

There are very few reported cases on this section or its equivalent under the Uniform Fraudulent Conveyance Act. We find nothing directly in point on what constitutes an unreasonably small capital and will argue from the facts in evidence.

About all the bankrupt had of value in the business was his stock in trade and his accounts receivable. He was to conclude the October transaction whereby he was to transfer the stock in trade and the accounts receivable in trust for the benefit of Respondent and others but was to continue to run the business. We believe it has never been the claim of respondents that as a part of the October transaction the Bankrupt actually received anything which had a value which could be turned into cash for creditors. Thus the

bankrupt transferred his assets and maintained his obligations. This is compelling evidence that the Bankrupt was left with an "unreasonably small capital" in order to transact business. Virtually no capital is an "unreasonably small capital."

Even if we should disregard the change in ownership caused by the trust and merely consider the obligations it imposed we see an unreasonably small capital.

The Bankrupt testified that his average gross mark-up on his merchandise was 20%. (Tr. Rec. p. 348.) As he continued to purchase merchandise and pay for it he would have 20% over its cost with which to work. From that he had to cover his overhead, his salary of \$400 per month plus fuel expenses, interest on the \$28,000 due Respondent, the trust costs and fees, etc. Yet 20% of all moneys had to be earmarked for the Respondent. It is clear that the Bankrupt had no working capital and the need for such was shown by the letters comprising Plaintiff's Exhibit 3. The plaintiff had a number of slow accounts. We think it is obvious that no business which sells on credit can earmark for liquidation of an old obligation an amount equivalent to its gross profit and yet have enough capital to operate.

The Trust Agreement although not naming Respondent in so many words as a beneficiary makes Respondent a beneficiary by the provisions earmarking the 20% of all moneys received for liquidation of the obligation to it. Thus the transfer to the trust or the

obligation to transfer to the trust the stock in trade and the present and future accounts receivable was a transfer made and an obligation incurred by a debtor within the meaning of the statute.

The only remaining question is whether there was fair consideration for the Bankrupts transfer. "Fair consideration" is defined by Bankruptcy Act Section 67d 1(e) as follows:

"Consideration given for the property or obligation of a debtor is "fair" (1) when, in good faith, in exchange and as a fair equivalent therefor property is transferred or an antecedent debt is satisfied or (2) when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained."

We assume that the only serious examination that need be made of the above definition is of part (1) thereof for part (2) refers to a transfer by the alleged fraudulent transferor for security for an obligation. The note given in the October transaction to Respondent was evidence of an obligation and no one would claim that a note was *security* for the obligation. Nor were the transfers in trust or the obligations to transfer security to Respondents for the obligation to them. The Bankrupt provided Respondent with no collateral for the obligation upon which Respondent might realize in the customary sense of the word "security."

As to part (1) of the statutory definition Respondent claimed and the court found that no antecedent

debt was satisfied by the October transaction. This leaves the question of whether Respondent transferred property in good faith, in exchange for the note and the transfers in trust by the bankrupt. The answer is no.

The only possibility of any transfer of property by Respondent was the transfer of the warehouse receipts it held covering most of the Bankrupt's stock in trade. This certainly could be property within the meaning of the statute.

Respondent's lack of good faith is shown in the discussion above in relation to the attempt to conceal the October transaction from creditors.

Respondent, however, did not really give up the security of the warehouse receipts for the receipts were transferred to Mrs. Lannin who was a guarantor of the Bankrupt's obligation to Respondent, and thus the benefit of the receipts was still available to Respondents. California Civil Code section 2854. Thus if we regard the substance of the transaction there was no transfer by Respondent and no fair consideration for the transfers or obligations or both undertaken by the Bankrupt in October.

IV.

THE OCTOBER TRANSACTION IS A FRAUDULENT CONVEYANCE UNDER BANKRUPTCY ACT SECTION 67d 2(a) AND CALIFORNIA CIVIL CODE SECTION 3439.04.

“Every transfer made, and every obligation incurred, by a debtor within one year prior to the filing of a petition initiating a proceeding under

this Act by or against him, is fraudulent as to creditors existing at the time of such transfer or obligation if made or incurred without fair consideration by a debtor who is, or will be, thereby rendered insolvent without regard to his actual intent."

The trial court made its finding that the Bankrupt was not insolvent at the time of the October Transaction. In making this finding, the trial court erred.

Even taken in the light most favorable to the Respondent, the evidence shows that the Bankrupt's financial condition at this time was such that his liabilities exceeded his assets.

That evidence with regard to his assets is as follows:

The value of the Bankrupt's stock in trade, including 20% markup over cost price, was \$30,000.00. (Tr. Rec. p. 348.)

The value of the accounts receivable was \$25,000.00. (Tr. Rec. pp. 518, 219, 268, 348.)

The value of the Bankrupt's equity in his furniture and equipment was \$2,000.00. (Tr. Rec. pp. 192, 268.)

The value of the Bankrupt's lot on Mt. Hamilton Road was \$2,500.00. (Tr. Rec. p. 192.)

Thus the total value of the Bankrupt's assets as of the October Transaction was \$59,500.00. These figures are taken from the most favorable evidence to the Respondent, and as will be shown below, exceed what the evidence shows as a true picture of the assets.

The evidence again taken in the most favorable light to the respondent, with regard to the Bankrupt's liabilities, is as follows:

The amount due to the Respondent was \$28,000.00. (Tr. Rec. pp. 220, 518.)

The amount due on other business accounts payable, was \$8,000.00. (Tr. Rec. p. 349.)

The amount due to Pearl K. Lannin was \$13,000.00. (Tr. Rec. p. 428.)

The amount due to Charles Lannin was \$13,000.00. (Tr. Rec. pp. 151, 344.)

The amount due the Bank of America was \$2,000.00. (Tr. Rec. p. 344.)

Thus the total amount due by the Bankrupt, taken in the light most favorable to the Respondent, was \$64,000.00, leaving under this view of the evidence an excess of \$4,500.00 of liabilities over assets.

It is the contention of the appellants that the above picture of the assets and liabilities of the Bankrupt is not in conformity with the true state of the evidence. The valuation of the accounts receivable should be placed at a lesser amount than the \$25,000.00 given them, for the value does not take into consideration any uncollectable or bad accounts and no aging of the accounts. (Tr. Rec. pp. 219, 220 and Plaintiff's Exhibits 3-4.) In the fourth letter of plaintiff's Exhibit 3, for example, Respondent, Hunter, called to the Bankrupt's attention the fact that he is dealing with slow and bad accounts.

Furthermore, the value of \$30,000.00 placed upon the stock in trade does not take into consideration the fact that some of the stock was unsalable or at least not worth full book value. A realistic valuation would certainly be less than the \$25,000.00 stated above.

The figure of \$8,000.00 set out above for the amount due on other business accounts payable is taken from the testimony of the Bankrupt. (Tr. Rec. p. 349.) The testimony of the Bankrupt's accountant (Tr. Rec. 220), and of the Respondent, Ramsay (Tr. Rec. p. 518), placed this amount at approximately \$12,000.00.

It is the belief of the Respondents that the trial court erred in its findings regarding the solvency of the Bankrupt, because of the great mass of evidence involved in the trial regarding the knowledge of the Bankrupt's insolvency by the Respondents. For the present purpose it is urged only that the court erred in the finding of solvency regardless of the knowledge of the Respondents.

CONCLUSION.

Under any of the subsections mentioned in our arguments the October transaction was a fraudulent conveyance. Under the urging of Respondents the Bankrupt devised a plan which included an actual intent to hinder, delay or defraud present and future creditors. Respondent had complete knowledge of the Bankrupt's intentions and was so close to the transactions and benefits received from them that its implication in the intention is evident. The transaction

was made while the Bankrupt was insolvent and left him without a reasonable amount of capital to carry on the business. The Respondents did not give a fair consideration for the transfers and obligations incurred. The Bankrupt made these transfers in secret from most of his creditors and yet retained practical control over his business. The Referee in Bankruptcy held the October Transaction to be a fraudulent conveyance as far as it related to Mrs. Lannin in litigation in which Respondents were not a party. The court below regarded the October Transaction as invalid as to payments pursuant to it and within 4 months of bankruptcy. This court should reverse the action of the court below insofar as it failed to invalidate the October Transaction in its entirety as a fraudulent conveyance.

Dated, San Jose, California,

July 15, 1957.

Respectfully submitted,

C. HUNTINGTON JACOBS,

DANIEL R. COWANS,

Attorneys for Appellant

Ralph E. Williams.

ROBERT N. JACOBS,

Attorney for Appellant

Pearl K. Lannin.



No. 15,201
United States Court of Appeals
For the Ninth Circuit

RALPH E. WILLIAMS, as Trustee in Bankruptcy of the Estate of George F. Elliff, an individual doing business as Pine Supply Co., bankrupt, and PEARL K. LANNIN,

Appellants,

VS.

TWIN CITY COMPANY, TWIN CITY LUMBER Co., JOHN W. HUNTER, FRANKLIN SUPPLY CORPORATION, SOUTHWEST MANAGEMENT CORP., H. A. COLLINS, and WILLIAM R. RAMSAY,

Appellees.

BRIEF OF APPELLEES.

SHAPRO & ROTHSCHILD,
155 Montgomery Street,
San Francisco 4, California,
Attorneys for Appellees.

DANIEL ARONSON, JR.,
155 Montgomery Street,
San Francisco 4, California,
Of Counsel.

FILED

OCT - 4 1957

PAUL R. GREEN, CLERK



Subject Index

	Page
Legal proceedings to date	1
Statement of facts	2
Legal issues	9
Argument	10
I. The applicable statutes	10
II. Note was issued for "fair" consideration	11
III. The "obligation" is unjustly attacked	12
IV. Note was not issued or received in fraud	14
Conclusion	19

Table of Authorities Cited

Cases	Pages
Blackburn v. Bechtel, 80 Fed. 2d 505	19
Central Hanover Bank & Trust Co. v. United Traction Co. (2d C.), 95 F. 2d 50	12
Coder v. Arts, 213 U.S. 223, 53 L.Ed. 772	16, 17
English, et al. v. Brown, et al. (3rd C.), 229 Fed. 34	17
First National Bank of Portland v. Dudley (9th Cir.), 231 F. 2d 396	20
General Kontrolar Co. v. Allen (6th Cir.), 124 F. 2d 123 ..	18
Hertzler, Trustee v. Nizzley, 144 Atl. 824, 14 Am. B. R. (N.S.), 725	14, 16
In re Peacock Food Markets, Inc. (7th C.), 108 Fed. 2d 453	16
Irving Trust Co. v. Chase National Bank (2d C.), 65 F. 2d 409	17
Irving Trust Co. v. Kaminsky, 19 F. Supp. 816	14
Lackawanna Pants Mfg. Co. v. Wiseman (6th C.), 133 F. 2d 482	14
Lines v. Falstaff Brewing Co., et al. (9th Cir.), 233 Fed. 2d 927	20
Nicholson v. Scott, 50 F. Supp. 209	14
Sherman v. Luckhardt, 67 Kan. 682, 74 P. 277	17
Woodruff v. Laugharn (9th C.), 50 F. 2d 532	15, 19

Codes

California Civil Code:	
Section 3439	9
Sections 3439.01 to 3439.12	18

TABLE OF AUTHORITIES CITED

iii

Rules

Pages

Federal Rules of Civil Procedure (28 U.S.C.A. 52a), Rule 52a	20
--	----

Statutes

Bankruptcy Act (11 U.S.C.A.):

Section 1(30)	13
Section 67	9
Section 67(d)	18
Section 67d(1)(e)	10
Section 67d(1)(e)(2)	11
Section 67d(2)	12, 13
Section 67d(2)(a), (b), (d)	10

Texts

Remington on Bankruptcy, 5th Ed., Vol. 4(a), Section 1649, page 62	13
--	----



No. 15,201

United States Court of Appeals For the Ninth Circuit

RALPH E. WILLIAMS, as Trustee in Bankruptcy of the Estate of George F. Elliff, an individual doing business as Pine Supply Co., bankrupt, and PEARL K. LANNIN,

Appellants,

vs.

TWIN CITY COMPANY, TWIN CITY LUMBER Co., JOHN W. HUNTER, FRANKLIN SUPPLY CORPORATION, SOUTHWEST MANAGEMENT CORP., H. A. COLLINS, and WILLIAM R. RAMSAY,

Appellees.

BRIEF OF APPELLEES.

LEGAL PROCEEDINGS TO DATE.

Appellees have no quarrel with the recitation in Appellants' Opening Brief on the above subject as far as it goes. It should be noted, however, that after the dismissal by the Referee in Bankruptcy of the summary proceedings instituted by the Trustee against Appellant Pearl K. Lannin, who attempted therein to join Appellee Twin City Lumber Co. as Respondent, neither Appellee Twin City Lumber Co. nor any other

of Appellees took any part in that summary proceeding and are, therefore, not bound in any respect by the Referee's determination that the "Trust Agreement" (which will be hereafter referred to as part of the so-called "October transaction") was void as against the Trustee.

Appellees have satisfied in full the judgment rendered by the trial court in favor of the Trustee on Count 3 of his complaint, and the judgment against the Trustee and in favor of Appellees on Count 2 has become final.

STATEMENT OF FACTS.

In 1953 the bankrupt was engaged in the retail lumber business in San Jose, California, and purchased a large part of his stock in trade from Appellee Twin City Lumber Co., a Los Angeles wholesaler. We agree that, for the purposes of this appeal, as well as at the trial, all of Appellees are to be considered in the same category as Appellee Twin City Lumber Co. and will hereafter be referred to by us as "Appellees." In May, 1953, by reason of the previous unsatisfactory payment record of the bankrupt, the so-called "May agreement" referred to in paragraph VII of plaintiff's complaint (T.R. p. 9; Pl. Ex. No. 1) was entered into between the bankrupt and Appellees whereby a so-called field warehouse was set up in the bankrupt's premises and wherein was deposited lumber sold by Appellees to the bankrupt and for which Douglass Guardian Warehouse Co. (Pl. Ex. No. 2, T.R. p. 92),

the operator of said warehouse, issued warehouse receipts in the name of and delivered same to Appellees, as security for the bankrupt's existing and continuing obligations to Appellees. An examination of this May transaction will indicate clearly that, except for defaults in payments by the bankrupt to Appellees, Appellees gained no "power to prevent the bankrupt from continuing in business" and then only had the right to "close the warehouse" to the extent of cancelling or withdrawing the rights by which, under the terms of the May transaction, the bankrupt was permitted to withdraw lumber from the field warehouse to a limited extent without payment for such withdrawals to be applied on his account with Appellees.

Between May and October, 1953, despite this liberal, workable and businesslike arrangement between the bankrupt and Appellees, the bankrupt's indebtedness to Appellees increased, his payments were not only delinquent but irregular and, in several instances, were made by checks which were not honored by his bank. Appellees then, properly, and in the exercise of their rights under the pledge arrangement of the warehouse receipts and the so-called "May agreement," instructed the warehouse company to permit no further withdrawals of lumber therefrom by the bankrupt without payment in full therefor, and advised the bankrupt that, unless some new and/or more satisfactory arrangement for security were made with them by the bankrupt they would cancel the May agreement and would, if necessary, foreclose their pledge of the lumber through the warehouse receipts.

As a result, and in order to be able to continue his retail lumber business, the bankrupt (*not Appellees*) initiated what has been referred to as the "October transaction" (Para. XI of Pl.'s Complaint, T.R. pp. 13-14). It is this "October transaction" which Appellants seek to have set aside as fraudulent and which was the subject matter of Counts 1 and 4 of the Complaint and of the Cross-Complaint (T.R. pp. 34-40). From judgment thereon in favor of Appellees this appeal has been perfected. The initiation, course, and scope of the "October transaction" is best indicated by the following excerpts from the transcript of testimony:

"(Testimony of Bankrupt, George F. Elliff)

Q. (By Mr. Jacobs). Now after that conversation with Mr. Ramsey what did you do in reference to preparing a new agreement if you did anything?

A. Well, I talked it over with them, with my wife. Then I went and talked to my mother-in-law and said that the only solution I could possibly think of myself was to——

Q. Is this a conversation between you and your mother-in-law?

A. This is a solution that I came up with with Mr. Ramsey.

Q. Is that what you told Ramsey?

A. That if she would sign a note for \$28,000.00 that we could work out some arrangements where the inventory could be her security and the signing of the note as guarantor and I mean to continue.

Then, I believe, if I am correct, I saw Mr. Ramsey or either he came to the warehouse again

the following week, I believe this took place over the week end.

On Monday I had a conversation and told him what I proposed to do or could do. He mentioned that he could not give me the final answer but he would discuss this with Mr. Hunter and that since time was of the essence in it he would give me an answer as soon as possible, which he did.

Q. Was this before or after the warehouse was locked up?

A. This was after the warehouse had been locked up.

Q. I see. Now then what happened next in reference to the negotiation of a new agreement?

A. There was several phone calls back and forth with Mr. Ramsey and myself. I believe Mr. Hunter called me directly and stated that he would consider this subject to submission of Mrs. Lannin's financial statement.

Q. Now you speak about an inventory being made security. Who suggested that arrangement?

A. To whom, sir? [105]

Q. Who suggested it to you? Did you originate the idea?

A. I originated that idea, yes." (T.R. pp. 171-172.)

∴ ∴ ∴ ∴ ∴

"... Mr. Shapro. Q. Mr. Elliff, who asked Mrs. Lannin to endorse and guarantee the payment of this \$28,000.00 note to Twin City?

A. I believe I did.

Q. Prior to the date that the note was issued, to your knowledge, did any representative of Twin City Lumber Company meet Mrs. Lannin?

The Court. Prior to what?

Mr. Shapro. Prior to the date of the note.

A. I believe Mr. Ramsey met her, if I am not mistaken.

Q. Was any request made of Mrs. Lannin to sign this note or guarantee this note by anybody, to your knowledge, on behalf of or by Twin City Lumber Company?

A. Not to my knowledge.” (T.R. pp. 351-353.)

“... (Testimony of Pearl K. Lannin)

A. That is my signature.

Q. That is also your signature. Mrs. Lannin, how did you happen to execute this guarantee?

A. You mean the note?

Q. Yes. Who asked you to do it?

A. My son-in-law and daughter came over to the house and he said he brought the daughter along——

. . . .

The Witness. They came over and he said that the reason he brought my daughter with him was that she was interested in it too, being his wife, and then he told me that he needed some money to keep going in the business.

At the time I didn't understand it was closed up by the lumber company.

Mr. Shapro. If your Honor please, what the lady understood is not what the question calls for.

The Court. Just say what was said, Mrs. Lannin, as well as you can, what you said, your son-in-law and daughter in the conversation.

The Witness. Anyhow he stated he wanted this amount [385] to make it as short as I can, and of course——

The Court. I am not asking you to make it short. Don't get that impression. I want you to say what was said, but just what was said, please.

The Witness. Well, of course, I was stunned to be asked for this much money, but at the same time, as I understood, just by observing that he had this large building out there and a lot of material there, not having any idea it would come to this point, we would ever be at Court with it, I did it out of the good of my heart, thinking that perhaps that was his one big chance, and my thoughts were that if I didn't, I might always be blamed that I didn't give him his chance and I said—I didn't say at that time that I would do it, but then a little bit later he came back or telephoned—I can't remember just how that I finally said I would do it, I would go along with it. I thing that is the gist of everything." (T.R. pp. 421-423.)

At this time the bankrupt owed appellees some \$28,000.00 to secure the payment of which they held in pledge valid warehouse receipts for lumber which cost \$25,000.00 and was worth, for resale by the bankrupt, \$30,000.00. By the terms of the October transaction (Trust Agreement, Pl. Ex. No. 7, T.R. p. 154), the bankrupt transferred to Mrs. Lannin his interest in all his stock in trade (both the warehoused lumber and the free lumber) and his accounts receivable. The proceeds of these were to be paid over by the bankrupt and held by his attorney in trust for the benefit of his mother-in-law, Appellant Pearl K. Lannin, and he agreed to a similar trust for all of his future stock in trade, whether or not purchased from Appellees and for all his accounts receivable. The accounts were in the amount of \$25,000.00. Appellees were neither parties to nor direct beneficiaries of that Trust Agree-

ment. In fact, the sole named beneficiary thereof was Appellant Pearl K. Lannin. As a part of the same October transaction, but necessarily prior thereto (by reason of the recitals contained in the Trust Agreement), the bankrupt and wife had executed, in favor of Appellees, the promissory note for \$28,000.00 (Defendants' Ex. B, T.R. p. 143) and Mrs. Lannin had endorsed and guaranteed the payment of that note to Appellees. *In consideration for such guarantee*, Appellees surrendered the warehouse receipts (which they had theretofore held as security for the bankrupt's admitted obligations equaling the amount of the promissory note) so that the warehouse company could and did reissue warehouse receipts covering the lumber then in the field warehouse in the name of, and delivered same to, Mrs. Lannin as security for her said guarantee to Appellees. Naturally, before Appellees surrendered their security in the form of the warehouse receipts they made an investigation as to the financial responsibility of Mrs. Lannin. (Financial Statement, Defendants' Ex.J.)

It is true that no notice was given to the creditors of the bankrupt of the October transaction and/or of the Trust Agreement, nor of the release and/or the transfer of the warehouse receipts by Appellees to Mrs. Lannin, but, as a result thereof, the bankrupt's business was reopened and continued, although apparently unprofitably until shortly before the institution of these bankruptcy proceedings in July, 1954.

LEGAL ISSUES.

We accept the legal issues as tendered in Appellants' Opening Brief (p. 6) and resolve them as follows:

1. The October transaction was not procured for the purpose of or with the actual intent or effect of hindering, delaying or defrauding the bankrupt's creditors. (Finding of Fact No. 1, T.R. p. 58.)

2. Under the October transaction the bankrupt transferred no property to Appellees nor did he incur any new obligations to Appellees but merely gave the \$28,000.00 promissory note to evidence his antecedent and admitted indebtedness in that amount to Appellees. (Finding of Fact No. 10, T.R. pp. 57-58.)

3. The property remaining in the hands of the bankrupt after the October transaction did not leave him an unreasonably small capital for his business. (Finding of Fact No. 5, T.R. pp. 54-55.)

4. The bankrupt was not insolvent at the time of the October transaction nor was he rendered insolvent thereby. (Finding of Fact No. 2, T.R. pp. 52-53.)¹

5. The bankrupt received fair consideration (as defined by Sec. 67, Bankruptcy Act and California Code Sec. 3439) for the October transaction. (Findings of Fact Nos. 10 and 11, T.R. pp. 57-58.)

¹In computing the alleged "insolvency" of the bankrupt in October, 1953, appellants (Opening Brief, pp. 16-17) set up aggregate liabilities of \$64,000.00, including \$13,000.00 due Mrs. Lannin. The bankrupt's accountant's testimony and records indicated that indebtedness at only \$7,000.00 (T.R. p. 221 and p. 270; Defendants' Ex. No. C for Identification), thus making a net worth of \$1,500.00 instead of a deficit of \$4,500.00. The records support the Court's finding above cited.

6. There was no fraud in the October transaction and there was adequate current consideration for the promissory note and hence same was and is valid and enforceable by Appellees against Appellant Pearl K. Lannin, the guarantor thereof. (Finding of Fact on Cross-Complaint, Nos. 2, 3 and 5, T.R. pp. 61-62.)

ARGUMENT.

Appellants seek to avoid as against the Trustee and the guarantor thereof and to cancel the \$28,000.00 promissory note of the bankrupt guaranteed by Appellant Mrs. Lannin, the bankrupt's mother-in-law. They do so, per their Opening Brief, by asserting that the so-called October transaction (which resulted in, among other things, the execution, guarantee, and delivery of this note to Appellees) was fraudulent under the following provisions of Sec. 67d(1)(e), (2) (a), (b) and (d), Bankruptcy Act; 11 U.S.C.A. 107d (1)(e)(2)(a), (b) and (d):

I. THE APPLICABLE STATUTES.

“Sec. 67d(1). For the purpose of, and exclusively applicable to, this subdivision d: . . . (e) consideration given for the property or obligation of a debtor is ‘fair’ (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied, *or* (2) *when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained.* (Italics ours.)

(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; or (b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent; . . . (d) as to then existing and future creditors, if made or incurred with *actual intent* as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors.” (Italics ours.)

II. NOTE WAS ISSUED FOR “FAIR” CONSIDERATION.

To the extent that this note is challenged as being “without fair consideration,” Appellants apparently ignore the italicized portion of Sec. 67d(1)(e)(2) of the Bankruptcy Act quoted above. Obviously there was here both a current consideration for and/or an antecedent debt represented or covered by this promissory note. The current consideration was the release of the warehouse receipts upon the lumber in the field warehouse admittedly worth at least \$25,000.00. The then existing (antecedent) obligations of the bankrupt to

Appellees, totalled \$28,116.63. They included the warehouse account, the three dishonored checks (two of which had been credited to the warehouse account and the other of which had been credited to the open account) plus interest on the warehouse account and \$21.00 protest fees on the three dishonored checks. (T.R. p. 481.)

III. THE "OBLIGATION" IS UNJUSTLY ATTACKED.

The only case which we have been able to find in which an "obligation," as distinguished from a "transfer," has been attacked under Section 67d(2) is *Central Hanover Bank & Trust Co. v. United Traction Co.* (2d C.), 95 F. 2d 50 at 55, wherein the Court says:

"The appellees urge that the principal note was issued in fraud of creditors, and is void under Section 273 of the New York Debtor and Creditor Law. The master reported that the Company was insolvent on December 31, 1928, and, although the finding is disputed by the appellant, we shall assume it to be correct. The argument is that renewal of a barred debt is the incurring of an obligation without a fair consideration, and forbidden by the statute if the debtor is insolvent. To so construe the statute is to ignore all history. It has never been deemed a fraudulent conveyance to pay an honest debt or to perform an obligation which the obligor was under a moral duty to perform, although the debt or obligation was legally unenforceable because of some statutory provision."

The only text comment on this phase of the statute, and which we believe to be a sound analysis is that:

“A bankrupt can defraud his real creditors by giving an obligation to *one not a creditor*, and thus make it possible for him to share in the estate.” (Italics ours.)

Remington on Bankruptcy, 5th Ed., Vol. 4(a),
Section 1649, Page 62.

The Bankruptcy Act does not define “obligation” but does define “transfer” which

“shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or unconditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor.”

Bankruptcy Act. Sec. 1(30), 11 U.S.C.A. 1(30).

Here there was, by the October transaction, no “transfer” whatever to Appellees by the bankrupt. Actually, Twin City Lumber Co. transferred (through its release of its warehouse receipts) its security position to *Mrs. Lannin*. Admittedly Twin City was, at the time it received the note guaranteed by Mrs. Lannin, a legitimate creditor of the bankrupt to the full extent of the face of the note. Hence the note (obligation) is not vulnerable to this attack.

IV. NOTE WAS NOT ISSUED OR RECEIVED IN FRAUD.

To the extent that this note is challenged under Section 67d2(d) of the Bankruptcy Act, *supra*, the burden of proving actual intent to hinder, delay or defraud creditors is upon the trustee. See *Nicholson v. Scott*, 50 F. Supp. 209, at 212 and *Hertzler, Trustee v. Nizzley*, 144 Atl. 824, 14 Am. B. R. (N.S.), 725, at 730:

“The words ‘hinder, delay, or defraud’ in section 276 of the Debtor and Creditor Law have no broader meaning than that put on the same expression in the familiar Statute of Elizabeth and do not embrace mere preferences. Section 276 was so construed by Mr. Justice Rosenman in *Doehler v. Real Estate Board*, 150 Mis. 733, 740-745, 270 N.Y.S. 385; and in *Watson v. Goldstein*, 174 Minn. 423, 219 N.W. 550, the same construction was placed on the equivalent words in the Minnesota enactment of the Uniform Conveyance Act.”

Irving Trust Co. v. Kaminsky, 19 F. Supp. 816, at 818.

Fraud is not to be presumed and something more is required than the mere weight or preponderance of evidence, and it must be established by clear, unequivocal and convincing evidence. *Nicholson v. Scott*, *supra*; *Lackawanna Pants Mfg. Co. v. Wiseman* (6th C.), 133 F. 2d 482.

For the sake of the argument only, taking, as did the trial court, all of the evidence in the case in the light contended for by Appellants we see *no evidence*

that the "obligation incurred by" the bankrupt (the \$28,000.00 note) was incurred "with actual intent . . . to hinder, delay or defraud . . . creditors."

"The only evidence tending to support the charge of actual fraud in the execution of the chattel mortgage for the purpose of hindering and delaying creditors is the evidence which tends to indicate that the purpose of the mortgage was to prevent the creditors of the corporation from seizing the property pending the formation of a Nevada corporation and the issuance of a part of the stock thereof in payment of the indebtedness due the appellant. It appears that the appellant was pressing the bankrupt for further security in the form of a chattel mortgage, *and as he was in a position to immediately enforce his claims against the bankrupt corporation*, there was no actual fraud to be inferred from the mere execution of the chattel mortgage. The trustee's allegation of fraud was based largely upon the contention that there was no indebtedness due from the bankrupt to the appellant, and the charge of fraud in that regard fell when it was clearly shown that there was such bona fide indebtedness." (Italics ours.)

Woodruff v. Laugharn (9th C.), 50 F. 2d 532, at 533.

Assuming then that the bankrupt was insolvent at the time of the October transaction (whether or not Appellees were cognizant of such insolvency) such insolvency would not be sufficient evidence upon which the trial court could have predicated a finding or conclusion that the note was fraudulent, either as against

the Appellant Trustee or as against Appellant Pearl K. Lannin.

“The Supreme Court has pointed out that an intent to prefer and an intent to defraud ‘are not of the same quality, either in conscience or in law, and one may exist without the other’; but in connection with the foregoing expression the Supreme Court also makes the following statement: ‘There is no necessary connection between the intent to defraud and that to prefer, but inasmuch as one of the common incidents of a fraudulent conveyance is the purpose on the part of the grantor to apply the proceeds in such manner as to prefer his family or business connections, the existence of such intent to prefer is an important matter to be considered in determining whether there was also one to defraud.’ Also, the Supreme Court has pointed out that the giving of a mortgage and its effect upon other creditors constitute an item of evidence to be considered in determining the question of fraud.

Since we conclude that there was substantial evidence to support the findings of the Referee, it is not necessary to consider whether the execution of a chattel mortgage under the circumstances constituted a fraudulent conveyance under the Wisconsin Bulk Sales Law. We hold that the District Court did not err in affirming the findings of the Referee in Bankruptcy and the order of the District Court is affirmed.”

In re Peacock Food Markets, Inc. (7th C.), 108 Fed. 2d 453, at 456;

See also *Coder v. Arts*, 213 U.S. 223, 53 L.Ed. 772; and *Hertzler, Trustee v. Nissley, supra*, at p. 729.

In *English, et al. v. Brown, et al.* (3rd C.), 229 Fed. 34, which was a case in which a husband in failing circumstances was indebted to his wife, and also to complainants, who had brought suit on their debt. The wife knew of such suit, and that the husband was in failing circumstances, and both she and the husband knew that he could not discharge both debts, and that payment of the one debt meant loss to the other creditor of his or her debt. The husband paid his debt to his wife, by transferring to her corporate stock the value of which was inadequate to cover his debt to her. It was there held that, in view of the rule in New Jersey that an insolvent debtor may prefer one creditor, even though the preferred creditor is his wife, this transfer was not a fraud upon complainants, even though the husband intended to defraud them; the wife accepting the stock for the sole purpose of obtaining payment of her debt, and not for the purpose of aiding her husband to defraud complainants. The Court (at page 39) said:

“The law recognizes the right of a debtor in failing circumstances to prefer a bona fide creditor by making to him a valid conveyance in consideration of his debt, and of the right of the creditors acting honestly and in good faith to accept the same as security for or in payment of the debt.”

In distinguishing the case of *Sherman v. Luckhardt*, 67 Kan. 682; 74 P. 277, the court in *Irving Trust Co. v. Chase National Bank* (2d C.), 65 F. 2d 409, at 411, said:

“But *Coder v. Arts*, supra, and lower federal decisions too numerous to cite, have said the

opposite. If the rule of *Sherman v. Luckhardt* be sound, then every preference may be attacked as a fraudulent conveyance, and the Court or jury will be required to make a finding not only that the recipient had no reasonable cause to believe that a preference would result, but also that the debtor was actuated only by an intent to prefer the favored creditor unaccompanied by an intent to hinder or delay other creditors. To so hold seems to us to destroy Section 60(b).''

A fraudulent intention (even if it existed in this case, which we deny) on the part of the Bankrupt Elliff in connection with the issuance of this note to Twin City Lumber Co. is not sufficient to render fraudulent the note itself. Under the Uniform Fraudulent Conveyance Act which is, for the most part, the basis of the applicable provisions of Section 67(d) of the Bankruptcy Act, and of Sections 3439.01 to 3439.12 of the California Civil Code the Court, in *General Kontrolar Co. v. Allen* (6th Cir.), 124 F. 2d 123, at 126, said:

''Under it (Uniform Fraudulent Conveyance Act), the majority of cases, where the transfer is for a valuable consideration, as distinguished from a voluntary, gratuitous transfer, hold that a fraudulent intent on the part of the debtor is not sufficient to invalidate the transaction *unless a corresponding intention or knowledge of the debtor's purpose on the part of the transferee is made to appear.*'' (Italics ours.)

Here no fraudulent intent whatever can be imputed to Twin City Lumber Co. where it had a legitimate debt of \$28,000.00 against Elliff, secured to the extent

of the (at least) \$25,000.00 worth of lumber in the warehouse and unsecured for the balance and was entitled to close the warehouse and to demand payment or security satisfactory to it as a condition precedent to its release of the warehoused lumber. See *Woodruff v. Laugharn, supra*, at p. 533, wherein Judge Wilbur of the 9th Circuit Court of Appeals was the author of the quotation cited above.

Taking the uncontradicted testimony of the Bankrupt Elliff on the subject of the circumstances surrounding, and the purpose of, his asking Twin City Lumber Co. to accept the guaranteed note and of his asking his mother-in-law, Mrs. Lannin, to guarantee it for him, we see, at best,

“an honest effort to avert a financial crash and to continue in business, thereby promoting the interest of all creditors ‘making a mortgage to secure an advance with which the insolvent debtor intends to pay a pre-existing debt does not necessarily imply an intent to hinder, delay or defraud creditors. *Dean v. Davis*, 242 U.S. 438, 444; 37 S. Ct. 130, 132; 61 L. Ed. 419. . .”

Blackburn v. Bechtel, 80 Fed. 2d 505 at 508.

CONCLUSION.

From the foregoing argument it appears clear to Appellees that the findings of fact made by the trial court, which were in all respects based upon conflicting evidence of substantial nature² adequately dispose

²An unbiased reading of the testimony of the witnesses J. N. Baum, George F. Elliff, H. Collins, John W. Hunter, W. W. Ramsay, and Pearl K. Lannin will clearly support this statement.

of all of Appellants' contentions herein because such findings are binding upon this court.

1. *First National Bank of Portland v. Dudley* (9th Cir.), 231 Fed. 2d 396;
2. *Lines v. Falstaff Brewing Co., et al.* (9th Cir.), 233 Fed. 2d 927, and the cases therein cited; and
3. Rule 52a of the Federal Rules of Civil Procedure (28 U.S.C.A. 52a).

A reading of the Complaint and Cross-Complaint in this case (which, incidentally, were filed on the same day) shows clearly that the theory of Appellants below was that the October transaction and the note were made by the bankrupt with actual intent to hinder, delay and defraud his creditors and that Appellees conspired with him in this alleged fraud. After the full opportunity given to Appellants by the trial judge to prove their case he concluded, and properly so, that there was no merit whatever in any of plaintiffs' alleged causes of action or in the Cross-Complaint, except for the recoverable preference involved in Count 3. This count covered only payments made by the bankrupt to Appellees on its *open account* (not on the secured warehouse account) for lumber delivered in November *after* the October transaction.

The very purpose of the October transaction as indicated in the testimony of the bankrupt himself and of Appellant Mrs. Lannin herself³ was to give him an opportunity to continue in business. Both the bank-

³T.R. pp. 171-172, T.R. p. 353, T.R. p. 360, T.R. pp. 421-428.

rupt and Mrs. Lannin were optimistic concerning this possibility and the general creditors of the bankrupt were in no way harmed by the October transaction either under the Trust Agreement or by the issuance of the note guaranteed by Mrs. Lannin. Even though admittedly no notice was given to creditors of the transaction (and perhaps the bankrupt and the other parties decided not to give notice because of the possible adverse effect upon the continuation of the business thereof) the fact remains that if notice had been given and the creditors had attached (as was apparently feared by the bankrupt and his attorney) the position of Twin City Lumber Co. would have been unchanged by such attachment. Appellees were then secured by a valid pledge (and no attack has ever been made by Appellants upon the validity of the May agreement) and surrendered that position, in effect, to Mrs. Lannin, in exchange for her guarantee of the bankrupt's note. (T.R. p. 396.) Actually, the general creditors of the bankrupt were benefited by the October transaction, because the effect thereof was to give the bankrupt a much more flexible operation of his retail lumber business than was possible under the strict terms of the May agreement. The fact that the October transaction did not save the bankrupt's business was no fault either of Appellees or of any part of the October transaction itself.

No point is made in Appellants' Opening Brief concerning the 4th Count of the Complaint, although the judgment thereon in favor of Appellees has been appealed. Perhaps Appellants were unable to find any

authority to support that 4th Count. The limit of the statutory right of the trustee in bankruptcy to set aside a fraudulent transfer or obligation under Section 67d of the Bankruptcy Act is to be found in Subdivision (6) thereof, which merely makes such a transfer or obligation "null and void against the trustee." There is no provision in the Bankruptcy Act, nor under the corresponding provisions of the California Civil Code, *supra*, for the collection by the trustee from the transferee or obligee of any damages "actual" or "penal" as prayed for in the 4th Count of Plaintiffs' Complaint, since by this action the trustee is seeking to enforce as against Appellees a purely statutory right, though there is no basis in law for such relief as is prayed for in that Count.

The findings of fact made by the trial court on the issues drawn on the Complaint and Cross-Complaint are amply supported by the evidence and, in turn, its conclusions therefrom support the judgment which should, therefore, be affirmed.

Dated, San Francisco, California,
September 25, 1957.

Respectfully submitted,

SHAPRO & ROTHSCHILD,

By ARTHUR P. SHAPRO,

Attorneys for Appellees.

DANIEL ARONSON, JR.,
Of Counsel.

No. 15,201

United States Court of Appeals
For the Ninth Circuit

RALPH E. WILLIAMS, as Trustee in Bankruptcy of the Estate of George F. Elliff, an individual doing business as Pine Supply Co., bankrupt, and PEARL K. LANNIN,

Appellants,

VS.

TWIN CITY COMPANY, TWIN CITY LUMBER Co., JOHN W. HUNTER, FRANKLIN SUPPLY CORPORATION, SOUTHWEST MANAGEMENT CORP., H. A. COLLINS, and WILLIAM R. RAMSAY,

Appellees.

Appeal from the United States District Court for the
Northern District of California, Southern Division.
Honorable O. D. Hamlin, Judge.

APPELLANTS' CLOSING BRIEF.

C. HUNTINGTON JACOBS,
DANIEL R. COWANS,
ROBERT N. JACOBS,

Bank of America Building,
San Jose, California,

Attorneys for Appellants.

FILED

OCT 21 1957

PAUL G. W. GIBBS

Subject Index

	Page
I. Subject of appellants' attack	2
II. The consideration furnished by appellees went to Mrs. Lannin and not to the bankrupt	4
III. The bankrupt was insolvent at the time of the October transaction	6
IV. Conclusion	8

Table of Authorities Cited

Cases	Page
Bank of Orland v. Harlan, 188 Cal. 413	5
Wells v. Girling, 1 Broderip and Bingham 447, 129 Eng. Reps. Reprint 795	5

Statutes	
Bankruptcy Act, Section 1(30)	4

Texts	
1 Cal. Jur. 2d, "Bills and Notes", Section 49, page 380	5

1874

No. 15,201

United States Court of Appeals For the Ninth Circuit

RALPH E. WILLIAMS, as Trustee in Bankruptcy of the Estate of George F. Elliff, an individual doing business as Pine Supply Co., bankrupt, and PEARL K. LANNIN,

Appellants,

VS.

TWIN CITY COMPANY, TWIN CITY LUMBER Co., JOHN W. HUNTER, FRANKLIN SUPPLY CORPORATION, SOUTHWEST MANAGEMENT CORP., H. A. COLLINS, and WILLIAM R. RAMSAY,

Appellees.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

Honorable O. D. Hamlin, Judge.

APPELLANTS' CLOSING BRIEF.

Appellants' position is that the bankrupt made transfers and incurred obligations in October which the law forbids as being unfair to other creditors. This position was successfully maintained against Mrs. Lannin in the Bankruptcy Court, and the transaction was set aside as to her. It is quite true that

this decision is not binding on Appellees,¹ as they successfully avoided being joined in the proceeding before the Referee on the grounds of lack of jurisdiction. The action in the court below was brought to complete the task of setting aside the October transfers. As stated in our opening brief, partial relief was given by the trial court on one of the grounds of the complaint. We say it was error not to give full relief asked.

I. SUBJECT OF APPELLANTS' ATTACK.

We set forth our contention that the bankrupt while insolvent made transfers and incurred obligations without the consideration the law demands as a protection to other creditors. Appellees deny the insolvency and due to a misunderstanding, assert there was adequate consideration for the October transaction. They apparently do not understand which transfers and which obligations are being attacked by Appellants.

Before the October transaction the bankrupt owed Appellees some \$28,000.00. In October he executed a promissory note to them, *transferred* his interest in his stock in trade and existing accounts receivable to a trust, incurred an *obligation* to transfer future stock in trade and accounts receivable to the trust. Taking all these actions together, there was a so-called fraudulent conveyance.

¹In Appellants' Opening Brief Appellees were incorrectly called Respondents.

Appellees apparently feel that Appellants sole attack is on the note. Thus the title of their Point II at page 11 states: "Note was issued for 'fair' consideration". Under Point III in which they claim that the obligation is unjustly attacked, their view that the obligation in question is the note only as shown by the last sentence which reads: "Hence the note (obligation) is not vulnerable to this attack." The title of Point IV at page 14 is: "Note was not issued or received in fraud". The arguments of Appellees under those points proceed accordingly on the sole question of whether the issuance of the note by the Bankrupt to Appellees was permissible.

If nothing more had occurred in October than the giving of the note to Appellees by the Bankrupt, we would not be in this court. If a debt exists, the giving of a promissory note on that debt is neither a transfer nor the creation of an obligation. No consideration would be required where, as here, the debt already existed.

The transaction however is broader than Appellees make it. The transfers in trust and the obligations of further transfers in trust are transfers and obligations which can be and are questioned and attacked. Appellees cannot isolate part of a transaction and claim it valid and ignore the balance of the transaction.

Appellees, considering only a part of the transaction, assert that there was no transfer to them by the bankrupt. Indeed the only thing handed to them by the bankrupt was the note but the law is not so un-

sophisticated as to overlook transfers in trust for the benefit of a person. Section 1 (30) of the Bankruptcy Act provided in part:

“Transfer shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein. . . .”

A transfer in trust is an indirect transfer. Appellees were not named in the Trust Agreement as beneficiaries by the express use of the word beneficiary but the Agreement (Tr. Rec. pp. 27 et seq.) provides that the Bankrupt was to collect receipts of the business and turn them over to the trustee who was to set aside 20% for Appellee. It would strain credulity to deny that Appellees were beneficiaries of the transfers and the obligations undertaken by the Bankrupt.

II. THE CONSIDERATION FURNISHED BY APPELLEES WENT TO MRS. LANNIN AND NOT TO THE BANKRUPT.

We have previously indicated that it is meaningless to talk of consideration for the note alone where a larger transaction is in question. Appellees protestations of a sufficient consideration for the note require no further answer. In our opening brief we detailed the lack of consideration for the entire October transaction. Appellees brief contains a statement in which is said (with the emphasis of italics) something which is important. Appellees surrendered the warehouse receipts to the warehouseman for reissuance to Mrs.

Lannin. Page 8 of Brief of Appellees commencing at line 2 says:

“As a part of the same October transaction but necessarily prior thereto (by reason of the recitals contained in the Trust Agreement) the bankrupt and wife had executed, in favor of Appellees, the promissory note for \$28,000 (Defendants Ex. B T.R. p. 143) and Mrs. Lannin had endorsed and guaranteed the payment of that note to Appellees. *In consideration for such guarantee*, Appellees had surrendered the warehouse receipts (which they had theretofore held as security for the bankrupt’s admitted obligations equalling the amount of the promissory note) so that the warehouse company could and did reissue warehouse receipts covering the lumber then in the field warehouse in the name of, and delivered same to Mrs. Lannin as security for her said guarantee to Appellees.” (Emphasis that of Appellees.)

Thus the consideration for Appellees acts in the October transaction was the act of Mrs. Lannin and not the transfers in trust and obligations of the Bankrupt.

As the Bankrupt’s acts in October constituted one transaction it should be so regarded by the court and even though the note standing alone would have been valid, the making and delivery thereof should be set aside as being part of a fraudulent transaction.

Bank of Orland v. Harlan, 188 Cal. 413, 421-422;

Wells v. Girling, 1 Broderip and Bingham 447, 129 Eng. Reps. Reprint 795;

1 *Cal. Jur.* 2d, “Bills and Notes”, Sec. 49, p. 380.

III. THE BANKRUPT WAS INSOLVENT AT THE TIME OF THE OCTOBER TRANSACTION.

Appellant's opening brief at pages 16 and 17 contains the computations under which we claim that the trial courts finding of solvency was untenable. Brief of Appellees at page 9, point 4 and footnote 1 contains their answer. The only difference concerns the amount the Bankrupt owed Mrs. Lannin. Appellants claim it was at least \$13,000. Appellees point to the testimony of the Bankrupt's Accountant Joel Baum in the transcript of record at pages 221 and 270 to show it was only \$7,000. An examination of page 220 discloses the following:

"Mr. Jacobs. Q. Can you tell us Mr. Baum, what the business owed at the time of this examination of its affairs in September?

A. It was in excess of \$50,000.

Q. Can you give us the exact figure or approximate it?

A. Yes. Approximately there was roughly \$28,000 owed to the Twin City Lumber Co. The others payable, I'd say, were in the neighborhood of \$12,000 or \$13,000, something like that. The unpaid balances on the equipment contracts were in excess of \$4,000 and at that time, *just on the business operation of the Pine Supply business by Mr. Elliff as the sole proprietor, he owed his mother-in-law Mrs. Lannin, \$7,000.*

Q. Now you have enumerated all the liabilities that have appeared on the records of the business?

A. Those were the only liabilities that would appear on the company records. Any sums that he might have borrowed from other people and

that I had no knowledge of would not appear on the books of the account for the Pine Supply business.”

It appears then that the bankrupt's accountant could and did testify only as to liabilities the bankrupt disclosed to him relating to the Pine Supply business. Mr. Baum again refers to \$7,000 owing at page 270 of the transcript.

Under cross-examination of Mr. Shapro, the Bankrupt testified (Tr. Rec. pp. 342, et seq.) as follows:

“Q. Now Mr. Elliff, in October, 1953, at the time of this meeting and the inspection of the books, whom did you owe money to other than the creditors of Pine Supply Company?

A. Personally you mean?

Q. Yes.

A. Mrs. Lannin, the Bank of America, Charles Lamb, maybe some small bills around—that wouldn't amount to——

Q. How much did you owe at that time, in October, the end of September—I am not trying to confuse you——

A. That's all right.

Q. —how much did you owe Mrs. Lannin?

A. Yes sir.

Q. How much?

The Court. Mrs.?

Q. (By Mr. Shapro). Mrs.?

A. That had grown to about \$18,000 about that time.

Q. By that time it had grown to about \$18,000?

A. Yes.

Q. That was not recorded in the books of the Pine Supply Company.

A. Only \$7,000, I believe, was ever recorded there because it was put into the business directly.

Q. And, as a matter of fact, the \$7,000 wasn't put in the books of the Pine Supply Company until December 31, 1953, was it?

A. I would have no knowledge of that.

Q. Then to your best recollection, all of the indebtedness to Mrs. Lannin, other than possibly \$7,000 was not recorded in the books of the Pine Supply?

A. No."

Appellees apparently have mistaken the obligation to Mrs. Lannin shown on the books of the company for the full amount of money owed to Mrs. Lannin. Mrs. Lannin also testified that the debt to her in October was \$13,000. (Tr. Rec. p. 428.)

CONCLUSION.

This case fails in an area of the law where there is little if any case authority for the propositions presented. We are asking the court to determine the meaning of the Statutes we set forth in our opening brief. We feel that upon consideration the court below was in error in failing to find that the type device used here was not permissible because it was unfair to the creditors of the Bankrupt. There were transfers made by an insolvent without fair consideration and these transfers and obligations left the Bankrupt without sufficient capital to carry on his business. The bankrupt intended to conceal these transfers from other creditors and appellees who had

knowledge of this intent. After the transfers the Bankrupt retained possession of his business and to other creditors and the general public was the apparent owner. This the law forbids.

We respectfully urge the court to reverse the decision of the court below.

Dated, San Jose, California,

October 18, 1957.

Respectfully submitted,

C. HUNTINGTON JACOBS,

DANIEL R. COWANS,

ROBERT N. JACOBS,

By DANIEL R. COWANS,

Attorneys for Appellants.

100
100
100
100
100

100

United States Court of Appeals
For the Ninth Circuit

TORA UPSTEAD RYSTAD, *Appellant*,

vs.

JOHN P. BOYD, District Director Immigration and
Naturalization Service, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION
HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLANT'S OPENING BRIEF

WARREN HARDY

Attorney for Appellant.

Office and Post Office Address:
1809 Northern Life Tower,
Seattle, Washington.





United States Court of Appeals
For the Ninth Circuit

TORA UPSTEAD RYSTAD, *Appellant*,

vs.

JOHN P. BOYD, District Director Immigration and
Naturalization Service, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLANT'S OPENING BRIEF

WARREN HARDY

Attorney for Appellant.

Office and Post Office Address:
1809 Northern Life Tower,
Seattle, Washington.





INDEX

	<i>Page</i>
Jurisdictional Statement	1
Statement	1
Appellant's Points on Appeal.....	3
The Evidence	4
The Law	4
Argument	5

TABLE OF CASES

<i>Consolidated Edison v. N. L. R. B.</i> , 307 U.S. 197.....	5
---	---

TEXTBOOKS

High's "Speeches of Lord Erskine," Vol. 2, pp. 568-569	6
--	---

STATUTES

Immigration and Nationality Act of 1952, 8 U.S.C.A. §241 (a).....	2
8 U.S.C.A. §1331.....	1
28 U.S.C.A. §1291.....	1

United States Court of Appeals

For the Ninth Circuit

TORA UPSTEAD RYSTAD,

Appellant,

vs.

JOHN P. BOYD, District Director Immi-
gration and Naturalization Service,

Appellee.

No. 15204

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court is conferred by the provisions of Sec. 1331, Title 8 U.S.C.A., and of this court by Sec. 1291, Title 28, U.S.C.A.

STATEMENT

Appellant is a citizen of Norway, having been born there July 1st, 1909, and has resided continuously in the United States of America since May 31st, 1928. She now lives in Seattle, Washington, is married to a United States citizen and has two children. She is a housewife.

On July 16th, 1954, appellant was arrested by direction of appellee upon a charge of being unlawfully in the

United States under the Immigration and Nationality Act of 1952, in that she was, after entry, an alien who was a member of the Communist Party of the United States, as set forth in Section 241 (a) of said Act.

After a hearing before a Special Inquiry Officer acting under the direction of the appellee, at which hearing appellant did not take the stand and testify, said Inquiry Officer made a written opinion and decision that appellant was an alien and that in 1945 and 1946. she had been a member of the Communist Party of the United States, and ordered her deported. He based his decision and order solely upon the testimony of Fred L. Thornburgh and upon an inference he drew adverse to appellant because of her failure to testify.

Thereafter appellant obtained other counsel than her original lawyer, or her present attorney, and moved to reopen the matter for further testimony and filed appellant's affidavit that she was not, and never had been a member of the Communist Party of America. The motion was denied. She appealed to the Board of Immigration Appeals and it denied her appeal, and later her motion to Reopen.

Appellant then brought habeas corpus proceedings, and the writ was denied and the petition dismissed by the Honorable William J. Lindberg, Judge of the District Court.

APPELLANT'S POINTS ON APPEAL

1. That the court erred in finding as a matter of fact (Paragraph VIII Findings of Fact):

“That the hearing officer found as a matter of fact that the petitioner is an alien, a native and citizen of Norway; that after entry at New York on May 31, 1928, at which time she was admitted for permanent residence, she was a member of the Communist Party of the United States at Seattle, Washington, in 1945 and 1946, for the reason that said findings were not supported by the evidence.”

2. That the court erred in concluding, as a matter of law (Paragraph I):

“That the deportation proceedings and the Motion to Reopen and administrative action pertaining thereto were judicially reviewed by the United States District Court for the Western District of Washington, Northern Division, in Cause No. 3986; that the court found (properly) that the record of administrative proceedings to be supported by reasonable, substantial and probative evidence, and that there was no denial of due process to the petitioner herein. That the judgment of the court in Cause No. 3986 is final and determinative of the issues presented therein.”

3. That the court erred in concluding as a matter of law (Paragraph 2):

“That the order of the Board of Immigration Appeals dated January 25th, 1956, denying appellant's ‘Renewal of Motion to Reopen’ did not deny petitioner due process, nor render the hearing unfair.”

4. That the court erred in concluding, as a matter of law (Conclusion No. 3):

“That respondent is entitled to an order dismissing the petition and quashing the order to show cause.”

5. That the court erred in making and entering its Order:

“That the petition in this cause be and the same hereby is, denied, and the rule to show cause heretofore issued discharged.”

THE EVIDENCE

The only witness upon behalf of appellee was Fred L. Thornburgh who testified that he was an informer, paid by the Federal Bureau of Investigation solely upon the basis of the names of alleged communists and their activities (R. 8), from 1942 until he terminated his membership in the Communist Party and quit working as a paid spy early in 1947 (R. 8). He identified appellant as a member from early in 1945 until he quit, and claimed to have given her membership stamps. On cross-examination he could not remember any details about the time and place of giving these stamps, or when and where he saw appellant at any meetings, or whether they were open meetings or closed ones where only communists could attend.

THE LAW

It is admitted that appellant is an alien, and that if she was a member of the Communist Party of the United States at the time stated, that she is subject to deportation.

ARGUMENT

Appellant contends that no inference adverse to her, should have been drawn by the Special Inquiry Officer. The burden was on appellee to prove that she was subject to deportation. But, if for the sake of argument, it is conceded that such is the law, then the action of the appellee in denying her the right to reopen the case and testify in accordance with her sworn affidavits, that she was not a communist and never had been, was a denial of legal rights, and the District Court erred in not so holding.

Appellant adopts the law cited by the Special Inquiry Officer as the definition of substantial evidence. Mr. Justice Hughes in *Consolidated Edison v. N. L. R. B.*, 307 U.S. 197, says:

“Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”

Manifestly the evidence of Thornburgh does not rise to this dignity. The inference from his testimony is inescapable. He said that he had no other reason than money in working as an informer, and that he was paid for names and information. He had a direct financial reason for turning in appellant's name, and his failure to remember any detail whatsoever supports no other theory than that his testimony about her membership and giving her membership stamps was false. He had taken the Federal Bureau of Investigation's money, and had to testify to what he did to escape admitting he had procured it under false pretenses. His imagination went no further than the bare outlines of a story.

The testimony of paid spies and informers comes from a very polluted source. Counsel feels that he is unable to comment upon it with the force and truth of what Lord Erskine said in his defense of Thomas Hardy, when in turn he quoted the eminent Englishman, Mr. Burke. It is as follows:

“A mercenary informer knows no distinction. Under such a system the obnoxious people are slaves, not only to the government, but they live at the mercy of every individual; they are at once the slaves of the whole community, and of every part of it; and the worst and most unmerciful men are those on whose goodness they most depend.

“In this situation men not only shrink from the frowns of a stern magistrate, but are obliged to fly from their very species. The seeds of destruction are sown in civil intercourse and in social habits. The blood of wholesome kindred is infected. The tables and beds are surrounded with snares. All means given by Providence to make life safe and comfortable, are perverted into instruments of terror and torment. This species of universal subserviency that makes the very servant who waits behind your chair, the arbiter of your life and fortune, has a tendency to debase and degrade mankind, and to deprive them of that assured and liberal state of mind which alone can make us what we ought to be, that I vow to God, I would sooner bring myself to put a man to death for opinions I disliked, and so to get rid of the man and his opinions at once, than to fret him with a feverish being, tainted with the jail distemper of a contagious servitude to keep him above ground, an animated mass of putrefaction, corrupting himself, and corrupting all about him.”

In addition to the above it must be remembered that the statute of limitations is founded upon a wise provision of law. In the State of Washington, where this matter was tried, all prosecutions for crimes, except treason and murder, are barred by a three-year limitation. Old evidence is unreliable. Thornburgh was testifying to matter over nine years old, and for that very reason it would not support a conviction for any common crime or a judgment for a debt. How can such testimony be held to be substantial? If it were on a charge of treason or murder, would it be enough to hang a person?

This is a serious situation. This wife and mother is being threatened with being taken from her husband and children and sent back to a country she left in 1928.

The question is not whether the appellee's officer believed Thornburgh. It is as to whether or not the discredited testimony of a paid spy and informer concerning something he claims happened so long ago is substantial evidence in a court of law. If it is, the District Court was right in denying the petition for a writ of habeas corpus, if it is not, then that court was in error and the case should be reversed.

Respectfully submitted,

WARREN HARDY

Attorney for Appellant.



**United States
Court of Appeals
FOR THE NINTH CIRCUIT**

TORA UPSTEAD RYSTAD,

Appellant,

v.

JOHN P. BOYD, District Director,
Immigration and Naturalization Service,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
*United States Attorney
Western District of Washington*
RICHARD F. BROZ
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURTHOUSE
SEATTLE 4, WASHINGTON

**United States
Court of Appeals
FOR THE NINTH CIRCUIT**

TORA UPSTEAD RYSTAD,

Appellant,

v.

JOHN P. BOYD, District Director,
Immigration and Naturalization Service,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
*United States Attorney
Western District of Washington*
RICHARD F. BROZ
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURTHOUSE
SEATTLE 4, WASHINGTON



INDEX

	Page
JURISDICTIONAL STATEMENT.....	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE.....	2
QUESTIONS PRESENTED.....	6
SUMMARY OF ARGUMENT.....	7
ARGUMENT	
I. <i>The District Court Entered Final Judgment in Cause Number 3986 on November 10, 1955; the Court's Judgment Therein Upheld the Legality of the Administrative Proceeding, and Said Judgment Is Not Subject to Appeal in the Present Cause by Reason of the Action Having Been Filed Again in the District Court</i>	9
II. <i>The District Court Properly Held that the Order of the Board of Immigration Appeals of January 25, 1956, Did Not Deny Appellant Due Process or Otherwise Render the Deportation Proceedings Unfair</i>	16
CONCLUSION	21

TABLE OF CASES

<i>Cruz-Sanchez v. Robinson</i> , 136 F. Supp. 52 (D.C. S.D. California, Central Division, 1955).....	12, 14
<i>Frank v. Mangum</i> , 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915).....	15
<i>Goto v. Lane</i> , 265 U.S. 393, 44 S.Ct. 525, 68 L.Ed. 1070 (1924)	15

TABLE OF CASES (*Continued*)

ii
Page

<i>Quattrone v. Nicolls</i> , 210 F. 2d 513 (C.A. 1, 1954), cert. den. 347 U.S. 976, 98 L.Ed. 1116, 74 S.Ct. 786.....	20
<i>Riddle v. Dyche</i> , 262 U.S. 333, 43 S.Ct. 555, 67 L.Ed. 1009 (1923)	15
<i>United States ex rel. Brzovich v. Holton</i> , 222 F. 2d 840 (C.A. 7, 1955)	20
<i>Vitale v. Hunter</i> , 206 F. 2d 826 (C.A. 10, 1953).....	17

STATUTES

5 U.S.C. 1009.....	1, 2
8 U.S.C. 1251(a) (Immigration and Nationality Act of 1952, § 241(a)).....	2, 4
28 U.S.C. 1291.....	2
28 U.S.C. 2201, 2202.....	1, 2
28 U.S.C. 2241.....	1
28 U.S.C. 2248.....	17

RULES

FEDERAL RULES OF CIVIL PROCEDURE

Rule 65.....	1
--------------	---

United States
Court of Appeals
FOR THE NINTH CIRCUIT

TORA UPSTEAD RYSTAD,

Appellant,

v.

JOHN P. BOYD, District Director,
Immigration and Naturalization Service,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Jurisdiction of the District Court is conferred by provisions of Section 2241, *et seq.*, Title 28, United States Code; Sections 2201 and 2202, Title 28, United States Code; Section 1009, Title 5, United States Code; and Rule 65, Federal Rules of Civil Procedure;

jurisdiction of this Court is conferred by the provisions of Section 1291, Title 28, United States Code.

STATUTES INVOLVED

The statutes involved are Section 1009, Title 5, United States Code; Sections 2201 and 2202, Title 28, United States Code; and Section 1251(a), Title 8, United States Code.

STATEMENT OF THE CASE

This case came before the lower court upon appellant's petition for writ of habeas corpus, challenging an order of deportation against her. The factual background of the case is set forth in the return to the petition for writ of habeas corpus, and the record of administrative proceedings attached thereto. The return was not traversed in the court below, and is set forth on pages 14 through 17 of the transcript of the record on appeal. The basic facts are as follows:

The appellant is a native and citizen of Norway, an alien presently residing within the United States at Seattle, Washington. She entered the United States at the Port of New York on May 31, 1928, at which time she was admitted for permanent residence. (R. 14, 18, 19, 20).

On July 16, 1954, appellant was served with a copy of a warrant of arrest issued by the District Director of the Immigration and Naturalization Service, the appellee herein; said warrant charged that after appellant's entry into the United States she had been an alien who was a member of the Communist Party of the United States and therefore deportable under the immigration laws (R. 14, 18).

A deportation hearing on the charges set forth in the warrant of arrest was held thereafter, pursuant to notice, at which appellant was represented by counsel (R. 18). The deportation hearing commenced on August 24, 1954, at which time the Government introduced certain exhibits and the testimony of one witness; at the conclusion of the government's case and cross-examination, appellant requested and received a continuance for a period of 28 days to permit her to prepare her defense (R. 19). Upon the convening of the continued hearing on September 21, 1954, appellant moved to dismiss the charges against her, which motion was denied. The appellant did not testify in her own defense, or present controverting evidence to the charges against her, although she was given a full opportunity to do so (R. 19). The Special Inquiry Officer, in making his ruling on the hearing, took the position that an adverse inference could be

drawn by him in view of petitioner's failure to testify (R. 19).

The Special Inquiry Officer found as a matter of fact that the appellant is an alien, a native and citizen of Norway, and that after entry at New York on May 31, 1928, at which time she was admitted for permanent residence, she was a member of the Holly Park Branch of the Communist Party of the United States at Seattle, Washington, in 1945 and 1946. He concluded that appellant is subject to deportation under the provisions of the Immigration and Nationality Act of 1952, Section 241(a), 8 U.S.C. 1251(a), in that she has been, after entry, an alien who was a member of the Communist Party of the United States, and on September 27, 1954, he entered an order that the alien be deported from the United States pursuant to law (R. 19, 20).

Thereafter appellant appealed the decision of the Special Inquiry Officer to the Board of Immigration Appeals in Washington, D. C., and the decision was affirmed by said board. Appellant then filed a motion to reopen the proceedings with the Board of Immigration Appeals, and on August 9, 1955, during the pendency of said motion, filed a petition in cause number 3986, in the court below, for review of administrative proceedings, declaratory judgment, and

for injunctive relief and show cause (R. 16, 20). The chief issues raised in the subject case were determined by the lower court in said cause number 3986, that is, the legality of the deportation proceedings had already been determined in the prior cause (R. 16, 21); the Board of Immigration Appeals denied appellant's motion to reopen the deportation hearing on September 15, 1955, and thereafter, on November 10, 1955, with the complete administrative record before it, the District Court entered judgment in cause number 3986, denying the relief prayed for in the petition in said cause (R. 20). No appeal was taken from said judgment.

Thereafter appellant, on November 21, 1955, filed a motion for new trial in cause number 3986, and on the same date submitted a motion to the Board of Immigration Appeals entitled "Renewal of Motion to Reopen Hearing on the Ground of, and for the Purpose of Presenting, New Evidence." The Board of Immigration Appeals denied the second motion to reopen the deportation hearing on January 25, 1956 (R. 16, 21); the District Court denied the motion for new trial in cause number 3986 on January 4, 1956.

No appeal was taken in cause number 3986; appellant was ordered by the Immigration Service to report for deportation on March 27, 1956; on March

26, 1956, one day prior to the scheduled deportation, appellant filed another petition for "Habeas Corpus And Order To Show Cause; For Declaratory Judgment And Injunctive Relief" (R. 3, 16, 21). The lower court denied the petition, concluding that as a matter of law the deportation proceedings and motion to reopen had been judicially reviewed in cause number 3986, and the judgment of the court therein was final and determinative of the issues presented therein. The lower court further concluded that the order of the Board of Immigration Appeals, dated January 25, 1956, in which appellant's second motion to reopen the deportation proceedings was denied, neither denied appellant due process nor rendered the hearing unfair (R. 20, 21).

This appeal followed.

QUESTIONS PRESENTED

1. Did the District Court properly deny appellant's petition for judicial review of deportation proceedings, after it had already reviewed said proceedings in prior cause number 3986 and entered judgment therein?

2. Did the District Court properly conclude that the order of the Board of Immigration Appeals dated January 25, 1956, denying appellant's second motion

to reopen the deportation hearing, neither denied appellant due process of law nor rendered the hearing unfair?

SUMMARY OF ARGUMENT

The appellant challenged the legality of the deportation proceedings against her by filing an action for judicial review in cause number 3986 of the judicial district for the Western District of Washington, Northern Division. The issue of whether the deportation proceedings were valid was determined in the affirmative by the District Court in said cause, and no appeal having been taken from the judgment, that determination is final and conclusive as to all issues presented therein.

Appellant sought to relitigate the legality of the deportation proceedings by filing a second action for judicial review, which was not in any material way different from the original action. Only one additional fact had occurred between the entry of judgment in cause number 3986 and the entry of judgment in the second action (cause number 4111), which is claimed to be material to the action . . . *i.e.*, that the Board of Immigration Appeals had denied appellant's *second* motion to reopen the deportation hearing for the purpose of producing new evidence.

Under the circumstances, the trial court properly held that it had already exhausted its function as a court of review relative to the legality of the deportation hearing and administrative functions preceding appellant's second motion to reopen the deportation proceedings; there remained only one matter for the court to review . . . the denial by the Board of Immigration Appeals of the second motion to reopen. The record fully supported the board's denial of said motion, and the court below had no alternative but to deny the challenge to the board's order. This the court did, and entered its order denying the petition for a writ of habeas corpus.

Appellant's position on appeal in essence challenges the sufficiency of the evidence in the administrative proceeding. This position completely ignores the fact that the issue had already been adjudicated in cause number 3986. The present appeal cannot serve as a vehicle to challenge the District Court's determination in the prior cause; that determination became final and conclusive when no appeal was taken in the first action within the time permitted for such an appeal. Appellant could not proceed before this Court by filing an appeal after the time for filing an appeal had run on the prior judgment; she cannot now appeal the same judgment by using the simple

expediency of filing the same action again in the District Court.

ARGUMENT

I.

The District Court Entered Final Judgment in Cause Number 3986 on November 10, 1955; the Court's Judgment Therein Upheld the Legality of the Administrative Proceeding, and Said Judgment Is Not Subject to Appeal in the Present Cause By Reason of the Action Having Been Filed Again in the District Court.

Appellant raises two chief questions on appeal. She first challenges the sufficiency of the evidence in the deportation hearings to sustain the lower court's judgment on judicial review, and secondly, the legality of the Board of Immigration Appeals' denial of appellant's second motion to reopen the deportation hearing to permit further testimony.

The District Court denied the appellant's petition for a writ of habeas corpus; the reason for the court's denial of relief on the question of the legality of the deportation hearing and subsequent administrative action preceding the appellant's second motion to reopen the deportation hearing, is apparent from the record . . . the sufficiency of the deportation hearing

had already been upheld by the court in a prior action between the same parties. The court had entered final judgment in cause number 3986 on November 10, 1955, after judicial review of the deportation proceedings including the appellant's original motion to reopen the deportation hearing. An examination of the findings of fact, conclusions of law, and final order in cause number 3986, which were attached to the return filed in this action, demonstrates that the court therein concluded that the Special Inquiry Officer could lawfully draw an adverse inference from appellant's failure to testify in her own behalf at the deportation hearing, and that the entire record of the deportation hearing did not show a denial of due process to the petitioner. The court further concluded that the findings of the Special Inquiry Officer were supported by reasonable, substantial, and probative evidence. *See* Exhibit C, attached to the return herein, and forwarded as enclosure number 3 in the certificate of the district court clerk to the record on appeal. The court declined to review the same matter again upon appellant's petition for habeas corpus, except to note that the matter had been judicially reviewed, and that the court's judgment thereon was final.

Appellant's petition for writ of habeas corpus was filed on March 26, 1956, more than four months

after final judgment had been entered in cause number 3986. The two actions are essentially the same, both involving the same parties, both seeking judicial review of the deportation proceedings. Presumably appellant relies on the fact that the present action is a habeas corpus proceeding, to which the doctrine of *res judicata* does not apply. But the rule does not permit relitigation of the same issue indefinitely, nor does it permit an appeal at a time wholly within the discretion of the petitioner. The matter having been once adjudicated, and no appeal having been taken from such adjudication, the judgment therein became the law of the case, and it is not subject to collateral attack by reason of the simple expediency of filing a petition in habeas corpus, raising the same issues again.

The present appeal does not present a situation wherein successive applications for writ of habeas corpus are taken, involving different issues which could have been but were not presented on the first application. Cause number 3986 sought judicial review of deportation proceedings under the declaratory judgment act and habeas corpus proceedings. The Government filed an answer to the petition, and final judgment was rendered after judicial review (R. 16; Exhibit C attached to the return forwarded to the record on appeal as enclosure number 3 of the district

court clerk's certificate to the record on appeal). The *same* relief was subsequently sought by appellant's petition in cause number 4111, the denial of which is the subject of this appeal.

Very nearly the same question was presented in *Cruz-Sanchez v. Robinson*, 136 F. Supp. 52. In that case the petitioner sought judicial review of an order of deportation first by habeas corpus, then by an action for declaratory judgment. The pertinent portion of Judge Byrne's well-reasoned decision is worthy of restatement here for the purpose of delineating the issue:

"The question here is whether Cruz-Sanchez may have a redetermination of the same issues previously adjudicated. He relies on *Shaughnessy v. Pedreiro*, 349 U.S. 48, 75 S.Ct. 591, 594, and contends that it authorizes judicial review in both habeas corpus and declaratory relief and therefore he is entitled to *two* judicial reviews of the same administrative proceeding. That is not the holding of the *Pedreiro* case. The *Pedreiro* court held 'that there is a right of judicial review of deportation orders other than by habeas corpus' and that an action for declaratory relief is an appropriate remedy to obtain such a review. The clear holding is that judicial review may be had *either* by habeas corpus *or* an action for declaratory relief. The Administrative Procedure Act provides the 'form of proceeding for judicial review shall be * * * any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of com-

petent jurisdiction.' It could hardly be contended that Congress intended to permit successive judicial reviews of the same administrative action in each of the various forms authorized, with resultant endless litigation and the indefinite postponement of execution of the administrative order. The conclusion is inescapable that Congress intended but one judicial review of administrative action.

"Cruz-Sanchez says it is elementary that the doctrine of *res judicata* does not apply to habeas corpus. That is a correct statement of the law which is founded upon the recognition of habeas corpus as the privileged writ of freedom. It is because of this status that courts are not foreclosed from considering successive applications for the extraordinary writ. However, we are not concerned with the application of the doctrine of *res judicata* to habeas corpus proceedings. This is an action for a declaratory judgment and not an application for the Great Writ.

"Ordinarily the office of habeas corpus is exhausted when it is ascertained that the agency or court under whose order the petitioner is being held had jurisdiction to act and the requirements of due process were observed. Judicial review of an administrative proceeding may be had in habeas corpus because the Administrative Procedure Act so provides, 5 U.S.C.A. § 1009(b), and the scope of habeas corpus is enlarged accordingly. The scope of judicial review of deportation proceedings whether invoked by habeas corpus or an action for declaratory relief is delineated by section 242(b) of the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1252(b). See *Marcello v. Bonds*, 349 U.S. 302, 75 S.Ct. 757. Section 242(b) sets forth various

requirements with respect to notice, right to counsel, right to present evidence and to cross-examine witnesses and provides that decisions of deportability shall be based upon reasonable, substantial and probative evidence. The scope of the review is exactly the same whether the remedy pursued is habeas corpus or an action for declaratory relief.

“The plaintiff has been afforded judicial review and a court of competent jurisdiction has determined that the deportation proceedings complied with the conditions and provisions of Section 242(b). A judgment rendered by a court having jurisdiction of the parties and subject matter is conclusive and indisputable evidence as to all rights, questions, or facts put in issue in the suit and actually adjudicated therein, when the same come again into controversy between the same parties or their privies.

“Although the defense of *res judicata* should ordinarily be pleaded; where, as here, the complaint on its face shows the prior proceeding, such defense may be presented by motion to dismiss.

“An alien is not entitled to repetitious judicial reviews of deportation proceedings. If discontented with the result of the first judicial review, his remedy is by appeal. The motion to dismiss is granted. Counsel for defendant to prepare, serve and lodge a formal order pursuant to local rule 7.”

Cruz-Sanchez v. Robinson, 136 F. Supp. 52, 53, *et seq.* (D.C., S.D. California, Central Division, 1955)

And so it is here. Appellant has already had a

judicial review of the deportation hearing, and if discontented with the results of the first judicial review, her remedy was by appeal. It is elementary that the office of habeas corpus may not be substituted for an appeal or writ of error, and that allowing the time to elapse within which an appeal might have been taken confers no right to habeas corpus as a substitute. *Goto v. Lane*, 265 U.S. 393, 402, 44 S.Ct. 525, 68 L.Ed. 1070 (1924); *Riddle v. Dyche*, 262 U.S. 333, 335, 43 S.Ct. 555, 67 L.Ed. 1009 (1923); *Frank v. Mangum*, 237 U.S. 309, 326, 35 S.Ct. 582, 59 L.Ed. 969 (1915).

Here the lower court entered judgment in appellant's first action for judicial review on November 10, 1955; more than four months later and one day prior to the date set for her deportation, appellant filed another action for judicial review. Under the circumstances the District Court was fully justified in ruling that the issues presented in the prior action of judicial review had been finally adjudicated, and in effect, were the law of the case. Appellant's attempt to bring them before this Court for review must fail for the same reason . . . the judgment of the lower court in appellant's first action for judicial review is a final and conclusive judgment, as no appeal was taken therefrom.

II.

The District Court Properly Held that the Order of the Board of Immigration Appeals of January 25, 1956, Did Not Deny Appellant Due Process or Otherwise Render the Deportation Proceedings Unfair.

Final judgment was rendered in cause number 3986, appellant's first action for judicial review, on November 10, 1955. On November 21, 1955, appellant submitted a motion entitled "Renewal of Motion to Reopen Hearing on the Ground of, and for the Purpose of Presenting, New Evidence" to the Board of Immigration Appeals. The motion was denied on January 25, 1956 (R. 16, 21). A prior motion to reopen the hearing was denied on September 15, 1955, the legality of which denial was adjudicated in cause number 3986 (R. 20).

The second action for judicial review, *i.e.*, the subject habeas corpus proceeding, introduced nothing into the case that had not already been adjudicated except for the denial of appellant's "Renewal of Motion to Reopen." This motion did not differ materially from appellant's previous motion to reopen the deportation hearing; both motions had the same objective . . . to reopen the proceedings for the purpose of offering further evidence on the issue of appellant's mem-

bership in the Communist Party. (Both motions were attached to the government's return to the petition in the court below, and were forwarded under the district court clerk's certificate to the record on appeal as enclosure number 3.)

The order of the Board of Immigration Appeals denying the "Renewal of the Motion to Reopen" (also attached to the return to the petition and forwarded to the record on appeal under enclosure number 3) demonstrates that the board fully considered the merits of the motion prior to entering its order of denial:

"Upon careful consideration of the record and representations made in support of the instant motion and prior motion, we have again concluded that a reopening of the proceedings is not warranted." Page 3, Order of the Board of Immigration Appeals dated January 25, 1956.

The relevant facts constituting the background of this case were set forth in the return to the petition for writ of habeas corpus, and the record of deportation proceedings attached thereto; they were not traversed, and were accepted as conclusive by the court below, as provided for under the provisions of 28 U.S.C. 2248. *Vitale v. Hunter*, 206 F. 2d 826, 829 (C.A. 10, 1953). A brief summary of these facts here may serve to place appellant's position relating to the

denial of the "Renewal" of the motion to reopen in perspective.

The Government relied upon the testimony of one witness and certain exhibits to establish the fact that appellant is an alien, and that she had been a member of the Communist Party in 1945 and 1946, after her entry into the United States. After the Government presented its case, and after extensive cross-examination of the Government witness, the appellant's attorney asked for and received a continuance of 28 days in order to prepare her defense. At the continued hearing, the appellant made no attempt to defend the matter except to move to dismiss the proceedings. The motion was denied, and the appellant was in effect advised that the Government had made a *prima facie* case. She nevertheless chose to remain silent, to offer no evidence, to offer no statement or witnesses in her own behalf. See pp. 56, 57, 58, transcript of hearing, attached as Exhibit A to the government's return and forwarded to the record on appeal under enclosure number 3 of the district court clerk's certificate.

Appellant's *first* offer to rebut the case against her came *after* the Special Inquiry Officer found her to be deportable as an alien who had been a member of the Communist Party of the United States after entry.

The entire record of the deportation hearing demonstrates that the finding of the Special Inquiry Officer was fully substantiated by the evidence. There was no contradicting evidence. As reflected on pages 9 and 33 of the transcript of the deportation hearing, the Government witness, who identified himself as the membership director of the Holly Park Branch of the Communist Party of the United States, positively identified appellant as a member of that unit of the Communist Party. On page 56 of the transcript, the colloquy discloses that appellant's attorney was satisfied with the 28 day continuance granted appellant to permit her to prepare a defense. Yet she made no defense at the expiration of that time, and did not offer to do so until after the matter had been determined adversely to her. She is now in the position of urging that the Board of Immigration Appeals, in declining to reopen the hearing to permit her to introduce evidence on issues which had already been resolved, rendered the deportation proceedings procedurally so defective as to deprive her of due process of law. *It is submitted that the administration of deportation hearings would be effectively blocked if the subject of the hearing could await a decision in the case before deciding to testify, and then secure a second hearing on the same issues.* Under such a procedure, why testify in any deportation case until an order of

deportation has been entered? Appellant's position regarding the issue of whether a denial of due process resulted from the board's refusal to order the hearing reopened is clearly untenable. The lower court was strictly limited, in judicial review of the deportation proceedings preceding appellant's second motion to reopen the hearing, to a determination of whether the deportation order was based upon "reasonable, substantial, and probative evidence." *United States ex rel. Brzovich v. Holton*, 222 F. 2d 840, 842 (C.A. 7, 1955). The District Court made such a determination in cause number 3986; the court's findings of fact, conclusions of law, and judgment in that cause were incorporated by reference in the return in the present case, and were determinative of the sufficiency of the evidence in the deportation hearing.

The lower court was similarly restricted in its function of judicial review as to the denial of appellant's second motion to reopen; the scope of its review was clearly defined in *Quattrone v. Nicolls*, 210 F. 2d 513, 516 (C.A. 1, 1954), certiorari denied 347 U.S. 976, 98 L.Ed. 1116, 74 S.Ct. 786.

"A petition for writ of habeas corpus was denied by the district court and this appeal resulted.

"The appellant contends that he was deprived of due process of law in the deportation hearings

because the hearings were procedurally unfair. Judicial review on this issue is limited to whether or not ‘* * * there was some evidence from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial’, U.S. ex rel. Vajtauer v. Commissioner of Immigration, 1927, 273 U.S. 103, 106, 47 S.Ct. 302, 304, 71 L.Ed. 560, and whether or not the appellant had a fair opportunity to be heard. The Japanese Immigrant Case (*Yamataya v. Fisher*), 1903, 189 U.S. 86, 23 S.Ct. 611, 47 L.Ed. 721; *Bilokumsky v. Tod*, 1923, 263 U.S. 149, 44 S.Ct. 54, 68 L.Ed. 221.”

The record in the subject case demonstrates that the order of deportation was supported by reasonable, substantial, and probative evidence; the lower court so held in a prior determination, and the record amply demonstrates that the appellant was given a full opportunity to be heard, although she did not avail herself of it.

Under the circumstances, the District Court properly denied the writ.

CONCLUSION

Although the issue of the sufficiency of the evidence is not before the Court because that issue was adjudicated in the first action for judicial review, from which judgment no appeal was taken, the record

adequately rebuts appellant's argument as to its sufficiency. The finding of deportability is fully substantiated by the record. Only after that determination had been made did appellant elect to defend herself from the charges against her, by filing her first motion to reopen the deportation hearing. Failing in this, appellant filed her first action for judicial review.

When the lower court sustained the order of deportation upon judicial review, appellant did not appeal. She elected instead to file another motion to reopen, and await further administrative action. The Board of Immigration Appeals denied the second motion to reopen on January 25, 1956, and appellant did nothing further relevant to the decision of the Special Inquiry Officer until she was ordered to report for deportation on March 27, 1956. On March 26, 1956, she filed the subject petition for habeas corpus, in sufficient time to delay deportation.

Under the circumstances, the District Court was limited in its function of judicial review to determining whether the deportation order was vitiated by the denial of appellant's second motion to reopen the deportation hearing. As the court was bound by its prior decision as to the sufficiency of the evidence in the deportation hearing, and as the record showed that

appellant had been afforded an ample opportunity to be heard, the court properly declined to grant the writ. For the foregoing reasons, it is respectfully urged that the decision of the court below be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

RICHARD F. BROZ
Assistant United States Attorney



No. 15,204

United States Court of Appeals
For the Ninth Circuit

TORA UPSTEAD RYSTAD,

Appellant,

vs.

JOHN P. BOYD, District Director, Im-
migration and Naturalization Service,

Appellee.

PETITION FOR REHEARING.

GLADSTEIN, ANDERSON, LEONARD & SIBBETT,
NORMAN LEONARD,

240 Montgomery Street, San Francisco 4, California.

Attorneys for Appellant and Petitioner.

FILED

AUG 19 1957

RECEIVED CLERK



Table of Authorities Cited

Cases	Pages
Bridges v. Wixon, 326 U.S. 135 (1945)	3
Galvan v. Press, 347 U.S. 522	2
Gruenwald v. United States, 353 U.S. 391	4, 5
Jencks v. United States, 353 U.S. 657	3
Mangoang v. Boyd, 186 F. 2d 199 (9 Cir., 1950).....	3
Ng Fung Ho v. White, 259 U.S. 276	4
Rowoldt v. Perfetto, 228 F. 2d 109 (8 Cir., 1955), cert. granted 350 U.S. 993, ordered re-argued June 24, 1957, 353 U.S., 1 L. Ed. 2d 1535.....	1, 2
Schoeps v. Carmichael, 177 F. 2d 391 (9 Cir., 1949)	3
Slochower v. Board of Higher Education, 350 U.S. 551....	5
Travis v. United States, 10 Cir., No. 5379, July 15, 1957....	5
United States v. Matles, E.D. N.Y., Civ. No. 13,121, July 11, 1957	4

Constitutions

United States Constitution, Fifth Amendment	6
---	---

Statutes

8 U.S.C. 1252(b)(4)	1
---------------------------	---

the

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

**United States Court of Appeals
For the Ninth Circuit**

TORA UPSTEAD RYSTAD,

Appellant,

vs.

JOHN P. BOYD, District Director, Im-
migration and Naturalization Service,

Appellee.

PETITION FOR REHEARING.

*To the Honorable Homer T. Bone, Dal M. Lemmon
and Frederick G. Hamley:*

This petition for rehearing is being presented by counsel who was retained in this case after the decision of this Court was rendered on June 21, 1957. An examination of the record convinces the undersigned counsel that there are at least three reasons why this petition should be granted and the case reheard in this Court.

1. The record before the administrative agency does not contain "reasonable, substantial and probative evidence" (8 U.S.C. 1252[b][4]) establishing that appellant was more than a "nominal" member of the Communist Party (cf. *Rowoldt v. Perfetto*, 228 F.

2d 109 [8 Cir., 1955], cert. granted 350 U.S. 993, ordered re-argued June 24, 1957, 353 U.S. [1 L.Ed. 2d 1535]).

The Board of Immigration Appeals found that the only witness against appellant was "unable to recall" the times when appellant attended party meetings or paid party dues. This witness "could recall only one meeting attended by him and [appellant] which he could positively state was a closed meeting." It is submitted that proof of attendance at only one Communist Party meeting is not proof by reasonable, substantial and probative evidence of a relationship to the Communist Party which is more than nominal. Cf. *Galvan v. Press*, 347 U.S. 522, 529. The issue of what constitutes more than nominal membership, touched upon in *Galvan*, is now before the Supreme Court in *Rowoldt*, and it is respectfully submitted that this Court should grant this petition and withhold its decision until the Supreme Court has spoken. Counsel for appellant is advised that on June 28, 1957, four days after *Rowoldt* was ordered re-argued in the Supreme Court, the Court of Appeals for the District of Columbia ordered rehearing in *Carlisle v. Brownell*, D.C. Cir., No. 13,711, a case involving issues similar to those presented under this point.¹

¹The order in the *Carlisle* case reads: "It is ORDERED by the Court that the above-entitled case be, and it is hereby, set down for rehearing at a time convenient to the Court after the decision of the Supreme Court in *Rowoldt v. Perfetto*, No. 34, October Term, 1956. Per Curiam."

Identical orders have been entered by the same Court in *Cherner v. Brownell*, No. 12,877; *Grondahl v. Brownell*, No. 13,158; *Hedge v. Brownell*, No. 13,018; *Martinez v. Brownell*, No. 13,014; *Peyro*

2. The administrative agency denied appellant due process of law by upholding the refusal of its hearing officer to require, as specifically demanded by appellant (Transcript of Deportation Proceedings, p. 14),² the production of the witness' reports to the Federal Bureau of Investigation. These rulings were made prior to the Supreme Court's decision in *Jencks v. United States*, 353 U.S. 657. There the Court held that in a criminal case the defendant "was entitled to an order directing the Government to produce for inspection all reports of [the witnesses] in its possession . . . touching the events and activities as to which they testified at the trial." (353 U.S. at 668). The Court made clear that this requirement was imposed upon the Government by the due process clause. "Justice", it said, "requires no less." (353 U.S. at 669).

It is submitted that what due process or "justice" requires in a criminal case may not be dispensed with in a deportation case. Cf. *Bridges v. Wixon*, 326 U.S. 135 (1945); *Mangoang v. Boyd*, 186 F. 2d 199 (9 Cir., 1950); *Schoeps v. Carmichael*, 177 F. 2d 391 (9 Cir., 1949).

Since the *Jencks* decision, the District Court for the Eastern District of New York has set aside a prior order of denaturalization and has directed further

v. Brownell, No. 13,703; *Kochi v. Brownell*, No. 13,264, and No. 13,374; *Estrada-Salazar v. Brownell*, No. 13,015; *Ramirez-Salse v. Brownell*, No. 12,852, and *Larson v. Brownell*, No. 13,039.

²This document is a part of Exhibit A attached to the return to the order to show cause herein (R. 15).

proceedings in a case in which it had previously refused to order the production of witnesses' reports to the Federal Bureau of Investigation so that cross-examination might be had thereon. *United States v. Matles*, E.D. N.Y., Civ. No. 13,121, July 11, 1957. Counsel understands that the Attorney General interposed no objection to this order.

Clearly, if due process requires the production of such reports in criminal and denaturalization cases, it can hardly be argued that this requirement is inapplicable to a deportation proceeding which may, and in this case will, result in the loss "of all that makes life worth living" (*Ng Fung Ho v. White*, 259 U.S. 276, 284).

3. The administrative agency denied appellant due process of law by holding that its hearing officer could draw an adverse inference from appellant's silence. This ruling was made prior to the decision of the Supreme Court in *Gruenwald v. United States*, 353 U.S. 391, which, in reversing a conviction because the prosecutor had inquired of the defendant about his prior invocation of his Fifth Amendment privilege against self-incrimination, emphasized that "no implication of guilt could be drawn from [the defendant's] invocation of his Fifth Amendment privilege . . . " (353 U.S. at 421). The Court cited with approval Dean Griswold's observations that

"Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit

perjury in claiming the privilege.” (353 U.S. at 421.)

The Court gave the dispositive answer to this claim by referring to its earlier decision in *Slochower v. Board of Higher Education*, 350 U.S. 551, where it had said:

“The privilege serves to protect the innocent who otherwise might be enmeshed by ambiguous circumstances.” (350 U.S. at 557-558.)

Since the decision in *Gruenwald*, and in reliance thereon, the Court of Appeals for the Tenth Circuit has reversed a conviction because the prosecutor was permitted to bring to the jury’s attention, through the cross-examination of defense character witnesses, the fact that on a prior occasion the defendant had refused to answer questions on the ground that his answers might incriminate him. *Travis v. United States*, 10 Cir., No. 5379, July 15, 1957. There the Court said:

“One who claims the rights and privileges of the Constitution most certainly does not exhibit a character defect of any kind and, if one who lawfully asserts the shelter of the Fifth Amendment becomes, in so doing, a person of guilt or a perjurer in the minds of some, the shame lies with those who misunderstand and not with him who is entitled to protection.”

We submit that the same reasons which prohibit a Court in a criminal case from drawing adverse inferences because of a defendant’s prior reliance on

his Fifth Amendment privilege, also prohibit an administrative agency from drawing such inferences in a deportation case in which the respondent [appellant here] refuses to testify, basing her refusal upon the due process clause (Transcript of Deportation Proceedings, p. 3).

This is particularly so on the facts of this case. For the record here reveals that after appellant learned that an adverse inference had in fact been drawn against her, she moved to reopen the record so that she could testify and rebut that inference (Motion to Reopen Hearing filed July 28, 1955, and Order thereon dated September 15, 1955).³ The denial of this motion underlines the extent to which appellant was deprived of due process of law on this issue.

CONCLUSION.

For the reasons

1. That there is no substantial, reasonable and probative evidence of more than nominal membership in the Communist Party;
2. That the administrative agency denied appellant due process of law by refusing to order the production of the Federal Bureau of Investigation reports requested; and
3. That the administrative agency denied appellant due process of law by drawing an ad-

³This document is a part of Exhibit B attached to the return to the order to show cause herein (R. 15).

verse inference from her refusal to testify and by denying her an opportunity thereafter to rebut that inference,

the judgment of this Court affirming the proceedings below was in error, and this petition for rehearing should be granted.

Dated, San Francisco, California,
August 15, 1957.

Respectfully submitted,
GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
NORMAN LEONARD,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
August 15, 1957.

NORMAN LEONARD,
*Of Counsel for Appellant
and Petitioner.*

United States Court of Appeals For the Ninth Circuit

COWLITZ TRIBE OF INDIANS, *Appellant*,

vs.

THE CITY OF TACOMA, a Municipal Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

THE HONORABLE GEORGE D. BOLDT, *Judge*

BRIEF OF APPELLANT

MALCOLM S. McLEOD
861 Dexter Horton Bldg.
Seattle 4, Washington

JAMES E. SAREAUT
Bush Building
Chehalis, Washington

FREDERICK PAUL
755 Dexter Horton Bldg.
Seattle 4, Washington

VINCENT ABBEY
904 Arctic Building
Seattle 4, Washington

THOMAS TWOHIG
70A Fremont Extension
Seaside, California
Attorneys for Appellant.

United States Court of Appeals For the Ninth Circuit

COWLITZ TRIBE OF INDIANS, *Appellant*,

vs.

THE CITY OF TACOMA, a Municipal Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

THE HONORABLE GEORGE D. BOLDT, *Judge*

BRIEF OF APPELLANT

MALCOLM S. McLEOD
861 Dexter Horton Bldg.
Seattle 4, Washington

JAMES E. SAREAULT
Bush Building
Chehalis, Washington

FREDERICK PAUL
755 Dexter Horton Bldg.
Seattle 4, Washington

VINCENT ABBEY
904 Arctic Building
Seattle 4, Washington

THOMAS TWOHIG
70A Fremont Extension
Seaside, California

Attorneys for Appellant.

INDEX

	<i>Page</i>
Appellant's Statement of the Case.....	1
Ruling of District Court.....	3
Jurisdiction	3
Violation of the 14th Amendment.....	3
Violation of Federal Statutes.....	5
Argument	7
Constitutional Precedent for Compensation for "Indian Title"	8
Can "Indian Title" Be Conveyed or Transferred by Implication Without the Assent of the In- dians, Although Congress Has Provided for Conveyance by Treaty?.....	10
Are Indians "People" and "Persons" Under the 5th, 10th and 14th Amendments?.....	11
Are Indians "Persons" Under the 14th Amend- ment?	12
Does Aboriginal (Indian Title) Title Create a Vested Right Legally Enforceable Against Ev- eryone Except the Sovereign?.....	18

CASES CITED

<i>Alcea v. United States</i> , 103 C.Cl. 550.....	19
<i>Beecher v. Wetherby</i> , 95 U.S. 517.....	8
<i>Buttz v. Northern Pacific Ry.</i> , 119 U.S. 55.....	19
<i>Cherokee Nation v. Georgia</i> , 5 Peter 1.....	8, 15
<i>Choate v. Trapp</i> , 224 U.S. 665.....	20
<i>Choteeau v. Molony</i> , 16 Howard 203.....	19
<i>Coyahoga River Power Co. v. City of Akron</i> , 240	
<i>Cramer v. United States</i> , 261 U.S. 219.....	19
<i>Cross v. Harrison</i> , 16 Howard 164.....	15
<i>Duwamish v. United States</i> , 79 C.Cl. 530.....	18
<i>Fleming v. United States</i> , 9 Howard 603.....	15
<i>Holden v. Joy</i> , 17 Wall. 211.....	19
<i>Iron Mountain, etc., v. City of Memphis</i> , 96 Fed. 113	4
<i>Johnson v. McIntosh</i> , 8 Wheaton 543.....	19

	<i>Page</i>
<i>Mitchell v. U. S.</i> , 9 Peter 711.....	8, 19
<i>Portland R. R. v. City of Portland</i> , 181 Fed. 632.....	4
U.S. 462	4
<i>Road Improvement District No. 2 v. Missouri Pac. R. R.</i> , 275 Fed. 600.....	5
<i>Teehiton v. United States</i> , 99 S.Ct. Advance Sheets 254-255	18
<i>United States v. Cook</i> , 92 U.S. 733.....	8
<i>United States v. Creek Nation</i> , 295 U.S. 108.....	8
<i>United States v. Kagama</i> , 118 U.S. 375.....	16
<i>United States v. Santa Fe Pac. R. R.</i> , 314 U.S. 339	8, 15, 18, 20, 22
<i>Worcester v. Georgia</i> , 6 Peter 615.....	8, 19

TEXTBOOKS

42 C.J.S. 1688.....	15
---------------------	----

STATUTES

Act of May 31, 1870, 16 Stat. 378.....	22
Act. of July 1, 1898, 30 Stat. 597, Ch. 546.....	22, 23
30 Stat. 620.....	22
Act of May 17, 1906, 34 Stat. 197, Ch. 2470.....	23
Indian Treaty Act 1850, 10 Stat. 437.....	11
Indian Treaty Act 1853, 10 Stat. 437.....	11
Judiciary Act of 1887, 24 Stat. 552 (as amended).....	4
Northern Pacific R. R. Land Grant Act, 13 Stat. 365	20, 21, 23
Ordinance of 1787, 1 Statutes 50, 51.....	6, 7, 11, 14
Oregon Donations Act of 1850.....	13
Oregon Territorial Act of 1848, 9 Stat. 323	
	6, 7, 9, 11, 12, 13, 14
Protection of Indians, 25 USCA 177.....	6
Santa Fe R. R. Land Grant Act, 14 Stat. 292.....	21
State of Washington Enabling Act, 25 Stat. 676.....	6
Treaty Act of 1850, 9 Stat. 437.....	11, 16, 17
Washington Territorial Act 1889, 25 Stat. 674.....	11

TREATIES WITH THE UNITED STATES

	<i>Page</i>
Treaty of Cosmopolis of 1855.....	9
Treaty of Medicine Creek, 10 Stat. 1132.....	2, 10
Treaty of Mukilteo, 12 Stat. 927.....	10, 18
Treaty of Point No Point, 12 Stat. 933.....	10
Treaty with the Makah, 12 Stat. 939.....	10
Treaty with Nez Perce, 12 Stat. 957.....	10
Treaty with the Quinaielt, 12 Stat. 971.....	10
Treaty with 14 Tribes of Yakima, 12 Stat. 951.....	10

UNITED STATES CONSTITUTION

Commerce Clause, Art. I, Sec. 8

Fifth Amendment7, 8, 12

Fourteenth Amendment3, 5, 6, 12

CONSTITUTION OF THE STATE OF WASHINGTON

Article XXIV, Sec. 2..... 11

OPINIONS OF THE ATTORNEY GENERAL

18 Op. Atty. Genl. 235..... 6

Op. Atty. Genl. 22 June 1885..... 6

Wirt Op. of Atty. Genl. 465..... 8



United States Court of Appeals

For the Ninth Circuit

COWLITZ TRIBE OF INDIANS, *Appellant,*

vs.

THE CITY OF TACOMA, a Municipal Corporation, *Appellee.*

No. 15211

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

THE HONORABLE GEORGE D. BOLDT, *Judge*

BRIEF OF APPELLANT

APPELLANT'S STATEMENT OF THE CASE

This is an action by the COWLITZ TRIBE OF INDIANS for damages and for an injunction against the City of Tacoma. The COWLITZ TRIBE OF INDIANS is a tribe recognized by the United States since 1855 when Territorial Governor Isaac Stevens made an unsuccessful attempt to make a treaty of peace and cession of their aboriginal title to their tribal lands in the Cowlitz River watershed in Southwestern Washington. Congress provided for extinguishment of Indian Title to their aboriginal lands (R. 90, 91) by treaty between the United States and the Cowlitz Tribe, but since no treaty was ever consummated their aboriginal title to their tribal lands has never been extinguished, as provided by acts of Congress hereinafter set forth. The tribal lands extend over three counties in Southwestern Washington, Thurston, Lewis and Cowlitz Counties.

The City of Tacoma has embarked on a plan to build two dams on the Cowlitz River in complete disregard of the rights of the Cowlitz Indians to their aboriginal lands under a license issued by the Federal Power Commission (R. 16) Project 2016. The City of Tacoma is acting in its proprietary capacity as a merchandiser of power to the general public and expects by its own admission to make a profit in excess of one million dollars per year. The City of Tacoma admittedly (R. 16) is proceeding to build those dams in disregard of plaintiff's rights. The defendant is proceeding to build the dams which will deprive the plaintiffs of their tribal lands, their water in the Cowlitz River and their fishery consisting of salmon and smelt which abound in this river and have furnished a large portion of the diet and livelihood of plaintiffs since time immemorial.

The aboriginal title of nine tribes adjacent to and north of the Cowlitz Tribal lands was extinguished by the Treaty of Medicine Creek in 1855, consisting of 2,236,160 acres (R. 92).

The defendant's answer admits that the graves of the plaintiffs' ancestors (R. 6, 7) in their ancient burial grounds numbering from four to six will be inundated and that defendant has made no provision whatsoever to disinter, remove, or rebury the departed ancestors (R. 14, 15) of the Cowlitz Tribe of Indians. The Cowlitz Tribe has never transferred or relinquished these lands in any manner whatsoever and they claim hunting, fishing and water rights in the Cowlitz watershed and river and its tributaries and all rights appurtenant thereto.

That the present members of the Cowlitz Tribe are the descendants of the tribe by the same name who sat in Treaty Council with Isaac Stevens in 1855 wherein they were recognized as a tribe and dealt with as a sovereign Indian nation and exist today as a duly organized tribe of American Indians by the Secretary of Interior.

That they are extremely primitive, living in the most dire poverty, and most of the Taitnapan Band speak little or no English and live in the same locations that their ancestors occupied in 1830 to 1855.

Ruling of District Court

The district court granted defendant's motion to dismiss on the grounds that the court was without jurisdiction over the subject matter. Plaintiffs filed notice of appeal on May 11, 1956, and received the Record on Appeal on October 30, 1956.

II.

JURISDICTION

This cause arises under the Constitution and laws of the United States and is otherwise within the Jurisdiction of the Federal Courts because of the time honored position of the American Indians as wards of the United States.

Violation of the 14th Amendment

Appellee in seizing the rights and properties and destroying the hunting, fishing and water rights of the appellant is violating due process of law, under the 14th amendment to the U. S. Constitution, as illustrated by

the following cases: In *Portland R.R. Co. v. City of Portland*, 181 Fed. 632, Appeal dismissed, 218 U.S. 686 (Bean, D.J., 1910 CC Ore.), the plaintiff, an Oregon corporation, sued to enjoin the City from taking its property. Held: The district court had jurisdiction. The court stated:

“If the order of the common council under its authority to open streets has deprived, or is about to deprive, the complainant of its property without due process of law, it is entitled to a remedy in this court under Judiciary Act of March 3, 1887, c. 373, 24 Statutes 552, * * * and the Federal Constitution.

“ * * *

“The fourteenth amendment is a guaranty to every citizen, private or corporate, that he shall not be deprived of property by a state, or any of its political subdivisions without due process of law, and the federal court has jurisdiction to enforce this guaranty.”

In the case of *Iron Mountain, etc., v. City of Memphis* (CCA-6, 1899) at 96 Fed. 113, a Tennessee corporation sued to enjoin a threatened taking of its property by a municipal corporation of Tennessee. Held: Jurisdiction in the Federal courts in an able and exhaustive decision by Circuit Judge William H. Taft.

In *Coyahoga River Power Co. v. City of Akron*, 240 U.S. 462 (1916) an Ohio corporation sued to enjoin an Ohio Municipal corporation for the latter's efforts in building a dam on the waters of the river belonging to the plaintiff and without any intention or attempt to pay the plaintiff for them, as in the case at bar:

Mr. Justice Holmes, for the court, wrote his usual

succinct and brilliant decision, holding that the Federal court had jurisdiction.

Since the City of Tacoma is the extension of the State of Washington, in its exercise of eminent domain it may be identified as "the State" under the 14th amendment as set out in the prior cases cited, see also *Road Improvement District No. 2 v. Missouri Pacific Ry.*, 275 Fed. 600, where the analogy is practically identical to the facts and the law in the case at bar:

"The power is conferred and the duty is imposed upon a Federal court sitting in equity to relieve by its decree, or other process, a citizen of the United States who properly invokes its aid from an arbitrary and unwarranted exercise of the legislative power of a state (or its subdivision), which, without due process of law or compensation threatens to deprive it of all or a part of its property."

Violation of Statutes

Another ground for jurisdiction of this Court is the violation by the City of Tacoma of 25 USCA 177, in that the City of Tacoma seeks an involuntary conveyance from the Indians by eminent domain, without compensation to the Indians. This statute was designed for the protection of the Indians under chapter 5, title 25 USCA, "Protection of Indians," and it is quoted in part:

"No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or Tribe of Indians, shall be of any validity in law or equity, unless the same be made by Treaty or Convention entered into pursuant to the Constitution."

The City of Tacoma is doubly culpable under this statute because they are attempting to accomplish an illegal involuntary conveyance of Indian property rights without any compensation whatsoever. Both of these violations are threatened without a semblance of due process under the 14th Amendment. An Attorney General Opinion defines the operation of this section (18 Op. Atty. Gen. 235) as follows:

“The operation of this section does not depend on the nature or extent of the title of the Tribe or Nation, and it applies whether the title is in fee simple or merely a right of occupancy.”

In like manner the appellee is violating the following federal statutes (R. 103, 104) :

Ordinance of 1787, 1 Stat. 50, 51, as quoted *infra* :

“The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent.”

Oregon Territorial Act, 9 Stat. 323 (August 14, 1849) :

“ * * * nothing in this Act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by Treaty between the United States and such Indians . . . ” (See opinion of Atty. General 22 June 1885)

State of Washington Enabling Act (Disclaimer Clause, 25 Statutes c. 180 p. 676, Section 4 Ss2:

“That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to . . . all lands lying within said limits owned or held by any Indian or Indian Tribes; and that until the title thereto shall have been ex-

tinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian Lands *shall remain under the absolute jurisdiction and control of the Congress of the United States: . . .*” (Emphasis supplied)

Under the obvious construction of the foregoing federal acts the City of Tacoma, as a subdivision of the State of Washington is violating each of these acts according to their express terms and is depriving them of their property without due process of law.

ARGUMENT

It is apparent that the infant nation composed of the colonial states recognized and compensated the Indians for their aboriginal title. It is also very apparent that this nation rejected the “title by conquest” theory advocated and practiced by nations in the old world. This departure is further supported in legislation prior to the adoption of the Fifth Amendment in 1791 in the Ordinance of 1787, which language was incorporated in the Organic Act of 1848 creating the Territorial Government of Oregon (covering the lands in question):

“The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent.”
(Statutes 50 and 51)

This admonition concerns the very land in question and defines the relation as trustee and ward between defendant and claimants.

Constitutional Precedent for Compensation for "Indian Title"

The Supreme Court of the United States in *Worcester v. Georgia*, 6 Peter 615, recognizes the fact that "Indian Title" could be extinguished by purchase as does the opinion of the Attorney General of the United States Wirt, in Op. A. G. 465.

The language of the Supreme Court in *U. S. v. Creek Nation*, 295 U.S. 108 at 110, is to the effect that the United States is the guardian of the Indians and this relationship:

"did not enable the United States to give their tribal lands to others, or to appropriate them to its own purposes, without rendering or assuming an obligation to render just compensation for them."

This language is compelling and forceful and can be understood only in the light of the background set out above as referring directly to the phrase "just compensation" used in the Fifth Amendment.

The view that Indian Aboriginal Title is compensable is supported by numerous cases: *United States v. Santa Fe Pacific*, 314 U.S. 339 at 345, wherein *Mitchell v. United States* is quoted, 9 Peter 711, at 746; that Indian title is recognized is further supported in *Cherokee Nation v. Georgia*, 5 Peter 1 at 48; *United States v. Cook*, 92 U.S. 733 at 755; *Beecher v. Wetherby*, 95 U.S. 517 at 526.

The *Mitchell* case *supra* held that a conveyance of aboriginal lands by an Indian, was valid and that such right was later confirmed by Spain and in turn by the United States and that the United States did not acquire the property under the cession from Spain.

Upon reviewing the precedents of these cases and the language of the treaty negotiations of the United States with plaintiff, the conclusion is inescapable that Congress intended to compensate the Indians for their aboriginally held lands.

The fact that Congress has not done so, does not give the City of Tacoma, an inferior appendage of the State of Washington, the right to seize the tribal lands and property of the Cowlitz Indians. If the sovereign is bound to respect these rights, then there is no question but what the City of Tacoma has no license whatsoever to invade them.

Although, in the case at bar, Congress recognized plaintiff's title and entered into treaty negotiations at Cosmopolis with Governor Isaac Stevens in February 1855, the Treaty was never concluded (R. 92, 93, 94).

The plain meaning of the words "utmost good faith toward the Indian" used by Congress in the Act creating the Government of Oregon Territory in 1848, binds the United States to the duty of a Trustee toward the Indians and requires performance of the highest order in word and deed.

This language clearly sets the standard but the intervening treaty negotiations, the failure to conclude a treaty, the failure to honor the Indian rights, and the wanton disregard for tribal lands and rights by appellees, describes a course of conduct and dealing which are anything but fair and honorable.

Since the taking is by third parties and not by the United States, there is all the more reason to insist

upon “due process” and “just compensation” for the “taking of private property from Indian tribes.”

Can “Indian Title” Be Conveyed or Transferred by Implication Without the Assent of the Indians, Although Congress Has Provided for Conveyance by Treaty?

Since there is in excess of 2,800,000 acres in the tribal lands claimed by plaintiff, it is doubtful that they could be transferred by some vague sequence of events as claimed by appellee.

The appellants have never transferred any of their tribal lands or property rights and have never assented to any transfer.

Indian title has been extinguished to a large part of the present State of Washington by various treaties covering lands adjoining those owned by appellants.

The court is requested to take judicial notice of the following treaties as the supreme law of the land, ceding Indian lands to the United States:

1. Treaty of Mukilteo (Pt. Elliott), January 22, 1854 (22 tribes), 12 Stat. 927;
2. Treaty of Point No Point, January 26, 1855 (15 tribes), 12 Stat. 933;
3. Treaty with the Makah, January 28, 1855 (5 tribes and bands), 12 Stat. 939;
4. Treaty of Medicine Creek, 12 Stat. 1132 (Sheh Nah-Nam Creek), December 26, 1854 (9 tribes);
5. Treaty with 14 tribes of Yakima, April, 1855, 12 Stat. 951;
6. Treaty with Nez Perce, June 11, 1855, 12 Stat. 957;
7. Treaty with Quinault, July 8, 1855, 12 Stat. 971.

The foregoing treaties are the means chosen by Congress for extinguishing "Indian title" and there is no treaty with plaintiff, and there is no act of Congress dealing with plaintiff's Indian title and no basis for their invasion of appellant's lands where appellee usurps the sovereignty of the United States of America.

Are these treaties the means of extinguishing "Indian title?" Or, should Congress have attached the phrase, "we really mean it," after the admonition of exclusive Congressional control in these acts?

Ordinance 1787, 1 Stat. 50 and 51 (*Supra*);

Oregon Organic Act 1848, 9 Stat. 323 (*Supra*);

Treaty Act 1850 and 1853, 10 Stat. 437 (*Supra*);

Washington Territorial Act 1889, 25 Stat. 674;

Washington State Const. Article XXVI (2).

It is heresy to constitutional precedent for appellee to don the cloak of the sovereign and appropriate the Cowlitz property rights while engaging in the proprietary business of merchandising electric power for profit.

Are Indians "People" and "Persons" Under the 5th, 10th and 14th Amendments?

Upon reading the solemn sentiments contained in these Acts of Congress which clearly spell out the special fiduciary (guardian and ward relation) between the United States and the Indians, the inescapable conclusion is that their title to their lands has never been extinguished, and that only Congress can expressly extinguish "Indian title."

That they are definitely “persons” and “people of the United States” under the 5th and 14th Amendments to the United States Constitution and that they have been denied due process of law under these amendments is obvious. Where Congress has spoken in such an emphatic, singular and precise manner, it is ridiculous for the appellee to maintain that a municipal corporation can assume the cloak of the sovereign and seize the lands and property rights of these Indians, without “just compensation.”

Are Indians “Persons” Under the 14th Amendment?

One might properly ask the question, “Are Indians persons under the 14th Amendment?” If they are “persons,” then should not the courts consider the admonition by Congress contained in the Ordinance of 1787 and the subsequent acts previously cited?

The following excerpts are quoted from the Oregon Territorial Act:

“ACT ESTABLISHING TERRITORIAL GOVERNMENT OF
OREGON

August 14, 1848, 9 Stat. 323

[Indian Rights of Person and Property
Preserved]

“PROVIDED that nothing in this Act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to

the government to make if this Act had never been passed: * * * ”

[Dams May Not Obstruct Salmon in Streams]

“Sec. 12 *And be it further enacted*, that rivers and streams of water in said Territory of Oregon in which salmon are found, or in which they resort, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams.”

[Ordinance of 1787 Extended to Oregon Territory]

“Sec. 14. That the inhabitants of said Territory shall be entitled to enjoy all and singular the rights, privileges and advantages granted and secured to the people of the Territory of the United States northwest of the River Ohio by the articles of the compact contained in Ordinance of seventeen July seventeen hundred and eighty-seven.”

[Reservation of School Lands]

“Sec. 20 * * * Sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same is hereby, reserved for the purpose of being applied to schools in said Territories hereafter to be erected out of the same.”

The Oregon Territory Organic Act of 1848, 9 Stat. 323, is the Statute which set the stage for Congress to acquire title to what is now the States of Oregon and Washington. There are four important provisions of that Act that define the rights of Indians in the New Territory obtained through the Treaty with Great Britain in 1846. The British did nothing to disturb the “Indian Title” of plaintiff, but insisted on paying the Indians for their lands as per the affidavit of Dr. Her-

bert Taylor herein (R. 39 to 68). These provisions are (as quoted above Section 1, Section 12, Section 14, and Section 20) :

(1) The *first section* of the Act preserves all Indian rights “of person or property” and “so long as such rights shall remain unextinguished by Treaty between the United States and such Indians.” This first section carefully protects these rights and is in derogation of Section 20 of the same Act which reserves Sections 16 and 36 for school purposes. Because the section one begins with this *Proviso* it is intended to qualify succeeding sections and therefore where sections 16 and 36 fall within Indian Lands to which the title has not been extinguished by Treaty, the schools did not get a title free of the Indian Title, but subject to the “Indian rights of property.”

(2) Section 12 of the Act forbids construction of dams which will not “allow salmon to pass freely up and down such rivers and streams.” While the defendant has attempted to make some provision for conserving the fishing it has presented nothing in the way of a plan or facility which will permit salmon to “pass freely up and down” or around or otherwise a 60 foot dam, let alone the 325 foot dam which is planned. It must be conceded that no spawning salmon going upstream or fingerlings going down river could ever survive this obstacle, nor the pressures created by such a head of water through the turbines.

(3) The Ordinance of 1787 has been discussed earlier in this writing on page 6, 7 and 11.

(4) Section 20 of the Act reserves section 16 and 36

which is subject to the "PROVIDED" clause in Section one, which in effect gives only the title the United States had at the time of the Act (1850) subject to the "Indian Title" which has never been extinguished.

Either a Treaty or express Federal legislation is required to extinguish Indian title and to annex territory.

Citing *Fleming v U. S.* (1850) 9 Howard 603; *Cross v. Harrison* (1853) 16 Howard 164, 197. 42 C.J.S. 1688 (Extinguishment of Indian title):

"Possessory right of Indians to their Tribal Lands is sacred, something to be taken from the Indians only with their consent and on such conditions as may be agreed upon, and while, as has been indicated, this right may be extinguished by the general government or the state in which is the fee only the government holding the fee can extinguish the right, and until the right is extinguished by some definite action it cannot be questioned.

"the right is extinguished only by plain and unambiguous actions."

United States v. Santa Fe R. R., 314 U.S. 339 (This case will be discussed at length later.)

The Treaty method of annexing Indian title was chosen by Congress because as stated in the case of *Cherokee Nation v. Georgia* (1831) 5 Peters 1, Indians were described by Chief Justice Marshall,

"They may more correctly, perhaps, be denominated Domestic dependent nations * * * they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian."

Chief Justice Marshall in the same case stated :

“The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the consent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States.”

The peculiar status of Indians is further described in the *United States v. Kagama* (1886) 118 U.S. 375 as follows:

“These Indian tribes are wards of the nation. They are communities dependent on the United States From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and treaties in which it has been promised, there arises the duty of protection, and with it the power The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all its tribes.”

In accord with the Congressional mandate to extinguish Indian Titles to their lands by Treaty, Congress enacted the Treaty Act of 1850, 9 Stat. 437, fol-

lowed by a Supplemental Act of 1853. Portions of the Act of June 5, 1850 are quoted as follows:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be authorized to appoint one of more commissioners to negotiate treaties with the several Indian Tribes in the Territory of Oregon, for the extinguishment of their claims to lands lying west of the Cascade Mountains; and, if found expedient and practicable, for their removal east of said mountains; . . . ”

“Section 5, *And be it further enacted*, That the law regulating trade and intercourse with the Indian Tribes east of the Rocky Mountains or such provisions as may be applicable be extended over the Indian Tribes in the Territory of Oregon.”
(7F896)

(1) It is significant that the first section calls for negotiating “Treaties with the Indians of Territory of Oregon, for the *extinguishment of their claims to lands* lying West of the Cascade mountains” If Congress had intended to disregard Indian rights of property, *why* did that august body devote dozens of statutes, treaties and millions of dollars to that end?

(2) Section 5 further preserves Indian Rights and extends Treaty Protocol of Eastern Tribes to the West:

Although the appellee claims that the Cowlitz Tribe of Indians’ rights have “long been extinguished,” no acts of Congress are cited which extinguish these rights and no cases have been cited supporting this contention.

Does Aboriginal (Indian Title) Title Create a Vested Right Legally Enforceable Against Everyone Except the Sovereign?

While the foregoing authorities and points are compelling, the cases are legion in supporting the fact that third parties (and by that term the defendant is included) cannot interfere with the aboriginal title of plaintiffs. In fact, the principal case relied upon by defendant, *Teehiton v United States*, 99 S. C. Advance Dec., 254-255, holds that such a title when shown to exist is good against the whole world but not as against the United States. 348 U. S. *Teehiton v. U. S. A.*

“This . . . amounts to a right of occupancy which the Sovereign . . . protects against intrusion by third parties . . . ”

The *Duwamish* case, 79 C. Cl. 530, is cited by defendant in support of its position when in fact that case holds that as against the United States, only Congress can decide the issues as to whether the sovereign can be forced by the courts to compensate Indians for aboriginal title. It is distinguished in any event, since it involves 22 Indian Tribes suing as parties to the TREATY OF POINT ELLIOTT OF 1855, *supra.*, and the COWLITZ have no treaty, and were not parties to that law suit and plaintiff cannot depend upon *res adjudicata*.

The Supreme Court of the United States has spoken on this problem and it has been resolved in favor of the Indians; the pertinent portions of the decision which came from the 9th Circuit in *United States v. Santa Fe R. R. Co.*, 314 U.S. 339, are quoted:

(1)“ This Court has consistently held that, in the absence of express language to the contrary, a fed-

eral grant of public lands does not constitute an extinguishment of Indian occupancy rights. Citing *Johnson v. McIntosh*, 8 Wheat. 543 at page 574.”

And from the same decision; defining “Indian Title”:

(2) “The term ‘Indian title’ used in Section 2 of the Act of 1866 had a well understood meaning. It connoted the Indian possessory right based on aboriginal occupancy, whether or not that occupancy had been recognized by treaty, statute, or otherwise. *Johnson v. McIntosh*, supra. at page 543 and *United States v. Shoshone*, 304 U. S. 111.”

With this definition in mind, and the following language from the *Santa Fe* case, the extensive authorities quoted by appellee on jurisdiction, the merits, and the naked assertion that “all . . . appellant’s rights . . . have long been extinguished by various acts of Congress (R. 17, 18),” we are curious to know how appellee can reconcile this case and the quoted statutes (at page 342):

(3) “This Court has continuously recognized that aboriginal possession creates a possessory right legally enforceable against everyone except the United States. Citing *Worcester v. Georgia*, 6, Pet. 515, *Mitchell v. United States*, 9 Pet. 711; *Choteau v. Molony*, 16 How. 203, *Holden v. Joy*, 17 Wall. 211, 244; *Buttz v. Northern Pacific R. R.* 119 U.S. 55, *Cramer v. United States*, 261 U.S. 219, and a host of other cases.”

At page 345, the above quoted *Santa Fe* case said:

(4) “Occupancy is a question of fact to be determined as any other question of fact. (see also *Alcea v. United States*, 103 C/Cl 550)”

And further from the same page:

(5) “As stated in *Mitchell v. U. S.*, supra, at

page 746, 'Indian right of occupancy is considered as sacred as the fee simple of the whites.' . . . "

And at page 354, we quote:

(6) "But an extinguishment cannot be implied in view of the avowed solicitude of the Federal Government for the welfare of its wards. As stated in *Choate v. Trapp*, 224 P.S. 665, 675, the rule of construction recognized without exception for over a century has been that 'doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the Nation, and dependent wholly upon its protection and good faith.'"

At page 355, we find an excerpt which is amazing in its application to the case at bar:

(7) "Their forcible removal in 1847 was not pursuant to any mandate from Congress. It was a high handed endeavor to wrest from the Indians lands which Congress had never declared forfeited."

A portion of the property to be condemned by the City of Tacoma are ten tracts which originally were granted to the Northern Pacific R. R. Six of these tracts were conveyed by the United States by patent to the railway company pursuant to the authority created by the Act of July 2, 1864, 13 Stat. 365, Chapt. 217. It is the position of the Indians that there is no way to distinguish between these railroad patents and those in the case of the *United States v. Santa Fe*, supra. The latter case is commonly known as the *Walapai* case, because the United States sued as guardian on behalf of the Hualpai or Walapai Indians. The Santa Fe Rail-

road acquired alternate sections of land along its line by authority of 14 Stat. 292. The words of the conveyance by the United States in 14 Stat. 292 are identical to those in 13 Stat. 365 (R. 17, 18), and are in part as follows:

“Sec. 3 . . . that there be, and hereby is granted to the ‘Northern Pacific Railroad Company’ its successors and assigns, (here the Santa Fe) . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States . . . and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated and free from preemption, or otherwise appropriated and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office. . . ”

A comparison between Section 2 of the two statutes (and those quoted by appellee) reveals that there is almost identical language, as follows:

“Sec. 2 . . . The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the said Indians and */only by their voluntary session* the Indian titles to all lands falling under the operation of this Act, and acquired in the donation of the */road/* named in this bill . . . ”

The portion in italics in the foregoing quotation is in the Walapai statute and is not in 13 Stat. 365, the statute covering the lands in the case at bar. But, of

course, the phrase “ . . . and only by their voluntary session . . . ” alludes to the relationship between the United States and the Indians and does not, nor cannot, enlarge or diminish the rights of the Railroad, or as, in the case at bar, the appellee. The important part of the two statutes is the grant of alternate sections by the United States, “ whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated and free from preemption or other claims or rights . . . ”

The interesting thing about this situation is that in the WALAPAI or Santa Fe case (314 U.S. 339), the Supreme Court held that aboriginal rights of the Indians survived the patents to the railroad, and that the railroad had to give an accounting of the use of such alternate sections from the time it acquired the property, which we assume would be shortly after 1865, up until at least 1941 when the case was decided.

Some of the first six lots referred to herein may have been granted under authority of the Act of May 31, 1870, 16 Stat. 378, but as before, the United States excepted “. . . mineral and other lands as excepted in the Charter of said Company of 1864.”

Two of the tracts identified by defendant apparently were conveyed pursuant to the Act of July 1, 1898, 30 Stat. 597, Chapt. 546. This was an appropriation act which had a “ rider ” attached to it at page 620, of 30 Stat. 620, and as before, the property conveyed to the railroad had to be “ free from any valid adverse claim ” * * * as though it had been originally granted.”

And further, relating to tracts identified by appel-

lee, two of the tracts were apparently conveyed to the railroad pursuant to the authority of the Act of May 17, 1906, 34 Stat. 197, Chapt. 2470, which merely extended the Act to July 1, 1898, 30 Stat. 597, 620, to a little later date.

The basic plan of the Acts of July 1, 1898, 30 Stat. 597, 620, and the Act of May 17, 1906, 34 Stat. 197, was that the railroad did not get all it bargained for because certain homesteaders and other persons securing rights under the Oregon Donations Act of 1850, had settled on such alternate sections. Therefore, in order to avoid a quarrel between the Railroad and such settlers, the United States granted the Railroad the right to select other sections of land in lieu of those claimed by the homesteaders and others under the Oregon Donations Act of 1850. So it is apparent that the basic rights that the Railroad had to the four tracts identified by defendant were acquired pursuant to 30 Stat. 597, and 34 Stat. 197, were merely replacements (in lieu of selections) of the basic grant in 13 Stat. 365, and logically would be burdened with any restrictions which were carefully set out in the basic statute.

Because all of the railroad grants are burdened with this encumbrance, referring to the tracts identified by defendant, which we assume are correct for the purposes of this brief, they are all subject to the claims and Indian titles of the COWLITZ TRIBE OF INDIANS. Thus, in conclusion of the matter of the Railroad grants, the statute says they are subject to the Indian rights and titles, and the railroad took title "at the time the line of said road is definitely fixed," then by analogy, it is a

question of fact as to the period for which the Railroads as well as others in possession of plaintiffs' lands, must account to plaintiffs for their use and occupation.

MALCOLM S. McLEOD,
One of Attorneys for Plaintiff.

MALCOLM S. McLEOD
861 Dexter Horton Bldg.
Seattle 4, Washington

J. FREDERICK PAUL
755 Dexter Horton Bldg.
Seattle 4, Washington

JAMES E. SAREAULT
Bush Building
Chehalis, Washington

VINCENT ABBEY
904 Arctic Building
Seattle 4, Washington

THOMAS TWOHIG
70A Fremont Extension
Seaside, California
Attorneys for Appellant.

United States Court of Appeals

FOR THE NINTH CIRCUIT

COWLITZ TRIBE OF INDIANS, *Appellant*,

VS.

THE CITY OF TACOMA, *a Municipal Corporation*,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

THE HONORABLE GEORGE D. BOLDT, *Judge*

ANSWER BRIEF OF APPELLEE

FILED

JAN - 7 1957

PAUL P. O'BRIEN, CLERK

MARSHALL MCCORMICK,
ROBERT R. HAMILTON,
Attorneys for Appellee

304 City Hall,
Tacoma, Washington.

United States Court of Appeals

FOR THE NINTH CIRCUIT

COWLITZ TRIBE OF INDIANS, *Appellant*,

VS.

THE CITY OF TACOMA, *a Municipal Corporation,*
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

THE HONORABLE GEORGE D. BOLDT, *Judge*

ANSWER BRIEF OF APPELLEE

MARSHALL McCORMICK,
ROBERT R. HAMILTON,
Attorneys for Appellee

304 City Hall,
Tacoma, Washington.



INDEX

	<i>Page</i>
Appellee's Statement of the Pleadings and Facts_	1
Issues Raised by the Pleadings on Jurisdiction_	1
Facts Admitted and Pertinent to Jurisdictional Issues _ _ _ _ _	6
Exhibit "1" annexed to Answer (R. 18) _ _ _ _	7
Exhibit "2" annexed to Answer (R. 17) _ _ _ _	9
Exhibit "3" annexed to Answer (R. 17) _ _ _ _	10
Appellee's Abstract of the Case_ _ _ _ _	11
Appellant's Contentions _ _ _ _ _	11
Questions Involved _ _ _ _ _	11
Argument _ _ _ _ _	13
Summary _ _ _ _ _	13
Argument in Support of Order of Dismissal_ _ _	13
Federal District Courts are courts of limited jurisdiction and burden is on appellant to sustain its jurisdiction _ _ _ _ _	14
Appellant has no vested property rights within "due process" clauses of the Constitution_ _	19
The Duwamish Case _ _ _ _ _	21
The Tee-Hit-Ton Case _ _ _ _ _	25
All rights appellant may have had have been extinguished by Congress _ _ _ _ _	30
Any rights appellant may now have are con- trolled by Federal Power Act_ _ _ _ _	33
Action to try title must be brought in county and under state law in which lands are located_	35
Argument in answer to appellant's argument_ _ _	37
Acts of appellee do not violate "due process" clauses of the U. S. Constitution_ _ _ _ _	37
No vested rights in appellant have ever been recognized by any acts of Congress and none exist _ _ _ _ _	42
Land grants reserved no rights to appellant_	49
Conclusion _ _ _ _ _	51

CASES CITED

	Page
<i>Beecher vs. Wetherby</i> , 95 U.S. 517, 24 L. Ed. 440	27
<i>Carolina and Northwest Ry. Co. vs. Town of Lincolnton</i> , 33 F. (2d) 719	39
<i>City and Town of San Francisco vs. United Railroads</i> , 190 F. 507	39
<i>Cuyahoga River Power Co. vs. City of Akron</i> , 240 S. S. 462, 60 L. Ed. 743	37, 41
<i>Duwamish et al vs. United States</i> , 79 Ct. Cls. 530	10, 20, 21, 22, 23, 24,, 25, 48
<i>East St. Louis Ry. Co. vs. City of East St. Louis</i> , 13 F. (2d) 852	39
<i>Farson vs. City of Chicago</i> , 138 F. 184	36
<i>Iron Mountain R. Co. vs. Cty of Memphis</i> , 96 F. 113	37, 40
<i>Little York Gold-Washing & Water Co. vs. Keyes</i> , 96 U.S. 199 (203) 24 L. Ed. 656 (658)	18
<i>McGhan vs. F. C. Hayer Co.</i> , 84 F. Supp. 540	36
<i>Menominee Tribe of Indians</i> , 95 Ct. Cl. 232	33
<i>Palestine Telephone Co. vs. City of Palestine</i> , 1 F. (2d) 349	39
<i>Parissi vs. General Electric Co.</i> , 97 F. Supp. 333	36
<i>Portland Ry. Light & Power Co. vs. City of Portland</i> , 181 F. 632 (Appeal dismissed 218 U.S. 686)	37, 39, 41
<i>Road Improvement District No. 2 vs. Missouri Pacific R. Co.</i> , 275 F. 600	37, 41
<i>Seattle Electric Co. vs. Seattle R. & S. Ry. Co.</i> , 185 Fed. 365	38
<i>Shoshone Mining Co. vs. Rutter</i> , 177 U.S. 505, 44 L. Ed. 845 (865)	18
<i>Shulthis vs. McDougal</i> , 225 U.S. 561, 56 L. Ed. 1205	18
<i>Smith vs. Sperling</i> , 117 F. Supp. 781	36
<i>Snowden vs. Hughes</i> , 132 F. (2d) 476 (478-479)	39
<i>Square D Co. vs. Uniterd Electrical, Radio & Machine Workers of America</i> , 123 Fed. Supp. 776, page 781 (3)	36

TABLE OF CASES—Continued

	<i>Page</i>
<i>State vs. Towessnut</i> , 89 Wash. 478, 154 Pac. 805_	29
<i>State vs. Wallahee</i> , 143 Wash. 176, 264 Pac. 1083_	29
<i>Tacoma vs. Taxpayers</i> , 43 Wn. (2d) 468, 262 P. (2d) 214 _ _ _ _ _	34
<i>Taylor vs. Smith</i> , 167 Fed. (2d) 797_ _ _ _ _	18
<i>Tee-Hit-Ton Indians vs. United States</i> , 384 U.S. 272, 99 L. Ed. 314_ _ _ _ _	21, 25, 26, 27, 28
Footnote 21, Page 325 of <i>Tee-Hit-Ton Case</i> _ _	28, 39
<i>United States vs. Alcea Band</i> , 329 U.S. 40, 91 L. Ed. 29 _ _ _ _ _	32
<i>United States vs. Minnesota</i> , 270 U.S. 181, 70 L. Ed. 539 _ _ _ _ _	32
<i>United States vs. Santa Fe Railway Co.</i> , 314 U.S. 339 _ _ _ _ _	49, 51

TEXTBOOKS

27 Am. Jur., Sec. 24, page 555_ _ _ _ _	20
27 Am. Jur., Sec. 33, page 561_ _ _ _ _	20
42 Am. Jur., Sec. 3, page 785_ _ _ _ _	30
42 Am. Jur., Sec. 10, page 792_ _ _ _ _	30
42 Am. Jur., Sec. 31, page 811_ _ _ _ _	31
42 Am. Jur., Sec. 32, page 812_ _ _ _ _	31
42 Am. Jur., Sec. 35, page 814_ _ _ _ _	32
42 Am. Jur., Sec. 70, page 846_ _ _ _ _	17
42 Am. Jur., Sec. 71, page 847_ _ _ _ _	17
54 Am. Jur., Sec. 6, page 665_ _ _ _ _	14
54 Am. Jur., Sec. 53, page 707_ _ _ _ _	15
54 Am. Jur., Sec. 139, page 770_ _ _ _ _	16
54 Am. Jur., Sec. 140, page 771_ _ _ _ _	16
12 ALR (2d) Sec. 10, page 33_ _ _ _ _	18
54 ALR 10, page 671_ _ _ _ _	15
1 Barron and Holtzoff, Federal Practice and Pro- cedure, Sec. 21, page 39_ _ _ _ _	15

STATUTES

	<i>Page</i>
Act Prohibiting Treaties, 16 Stat. 566, 25 U.S.C.A. 71 -----	49
Enabling Act Establishing State of Washington, 25 Stat. 676, Sec. 4-----	42, 43, 44
Federal Power Act 791(a) through 823-----	3, 34, 46
Homestead Act, 12 Stat. 392-----	7
Indian Claims Act, 25 U.S.C. 70-----	12
Land Act Involving Indians, 23 Stat. 96-----	8
Land Act Involving Indians, 24 Stat. 388-----	8
Land Act Involving Indians, 60 Stat. 1050 et seq.-	9
Northwest Ordinance of 1787, 1 Stat. 50-51, Act III -----	42
Oregon Territory Act, 9 Stat. 329, Sec. 14-----	42, 43
Organic Act Establishing Territory of Washing- ton, 10 Stat. 172, Sec. 12-----	42, 46
Public Land Act, 3 Stat. 566-----	7
Railroad Land Grant Act, 13 Stat. 365-----	7
Railroad Land Grant Act, 16 Stat. 378-----	7
Railroad Land Grant Act, 30 Stat. 597-----	8
Railroad Land Grant Act, 34 Stat. 197-----	8
Revised Code of Washington, 4.12.010-----	35
Treaty Act of 1850, 9 Stat. 437-----	42, 43

CONSTITUTIONS

5th Amendment to U. S. Constitution-----	39
14th Amendment of U. S. Constitution-----	37, 39
Washington State Constitution Act XXVI-----	42, 45

REGULATIONS AND RULES

Federal Rule of Civil Procedure Rule 12(d)-----	6
---	---

United States Court of Appeals

FOR THE NINTH CIRCUIT

COWLITZ TRIBE OF INDIANS,

Appellant,

VS.

THE CITY OF TACOMA, a Municipal
Corporation,

Appellee.

No. 15211

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

THE HONORABLE GEORGE D. BOLDT, *Judge*

ANSWER BRIEF OF APPELLEE

APPELLEE'S STATEMENT OF THE PLEADINGS AND FACTS

Issues Raised By the Pleadings on Jurisdiction

This action was instituted by the appellant to enjoin the appellee from constructing two dams upon the Cowlitz River in Lewis County, Washington, and from selling any of its bonds in connection therewith until the alleged rights of the appellant can be ascertained.

Appellant sues here as an Indian tribe and not as individuals.

The appellant in its Complaint sets forth four separate causes of action (R. 3-13). All are based solely

upon its claimed aboriginal or Indian title. All property is located in Lewis County, Washington (Maps, Appellee Ex. 1).

Briefly these rights, as claimed in these four separately stated causes of action are as follows:

(1) Appellant claims a fee simple title and interest in all of the lands, including all the rights pertaining and appurtenant thereto which the appellee has acquired or will acquire in the construction and operation of the Mayfield and Mossyrock Dams on the Cowlitz River (R. 3-6).

(2) On information and belief, appellant alleges the existence of several Indian burial grounds which it is claimed will be inundated upon the completion of the dams; that the appellee has made no provisions for compensation; and that such acts violate the culture of the Indians and constitute a sacrilegious interference with their burial grounds (R. 6-8).

(3) Appellant alleges that Congress, by an act dated March 2, 1853, (10 Stat. 172), which established the territorial government of Washington, provided that certain lands should be set aside for schools and other purposes; that under said act certain of appellant's lands above described were appropriated without compensation to the appellant and without its consent, in violation of its aboriginal or original Indian title; appellant further alleges a violation by the appellee of the appellant's fishing rights on the Cowlitz River over the properties involved (R. 8-9).

(4) Appellant alleges that the appellee is violating appellant's rights in that no compensation has been paid to the appellant for the appropriation of its water rights on the Cowlitz River drainage, and that the appellee is proceeding to build said dams in violation of certain State statutes therein mentioned (R. 9-12).

Appellant then prays that the appellee be restrained from the construction of these dams, from selling any bonds in connection with the financing thereof until all rights of the appellant can be ascertained; and for judgment for damages in the total sum of \$80,014,-861.39, with interest thereon, and for appellant's costs (R. 12-13).

The appellee in its Answer to the Complaint admits: That the City of Tacoma has passed Ordinance No. 14386, which provides for the building of two dams on the Cowlitz River, pursuant to a license issued by the Federal Power Commission, being Project No. 2016 issued November 27, 1951, under the Federal Power Act (16 USCA, 791 (a) through 823); that it is proceeding to build these dams in accordance with this permit, and that in so doing it is purchasing from the present owners and taking possession of the lands and rights involved in said project. The appellee either denies specifically or upon information and belief all of the remaining principal allegations of the Complaint (R. 13-17).

The appellee further sets up in its Answer eight separately stated defenses (R. 17-21). Four of these defenses are defenses involving the jurisdiction of the Court and the question as to whether or not the facts

alleged state a claim upon which relief can be granted to the appellant. These defenses are those which may be determined by a preliminary hearing in accordance with Rule 12(d) of the Federal Rules of Civil Procedure (R. 17-18). These defenses are set forth in appellee's Motion and Application for a preliminary Hearing (R. 21-23).

Briefly these four defenses are as follows:

(1) The Court has no jurisdiction of this cause, because all appellant's claims are based solely on aboriginal or Indian title, and the issues raised herein are political and are not judicial. In the absence, as here, of Congressional recognition of such title and specific authority for the appellant to sue for violation of any alleged rights so recognized, this Court has no jurisdiction over either the subject matter of this suit or the parties hereto, the appellant's only recourse being the prosecution of its claims against the United States under the provisions of the Indian Claims Act, which course it is pursuing, as more particularly set forth in "Defendant's Exhibits 2 and 3" which are annexed to Appellee's Answer (R. 17).

(2) The Court has no jurisdiction of this cause, because the appellant has no rights whatsoever, either legal or equitable, that are enforceable herein; all rights, if any, that the appellant may have had in the lands and rights pertaining and appurtenant thereto and involved herein, have been long extinguished by various acts of the Congress of the United States and the issuance of patents and grants pursuant thereto (except as still owned by the U. S.) by the United

States Government, copies of which patents, grants or conveyances, and index thereof, are marked as "Defendant's Exhibit 1" and annexed to appellee's Answer (R. 17-18).

(3) The Court has no jurisdiction of this cause, because the Complaint does not show on its face that the action is one arising under the Constitution or laws of the United States or otherwise within the jurisdiction of the Federal Courts; the action is between citizens of the same state, to-wit, the State of Washington, and the issues involve solely the title and rights to land located wholly within Lewis County, Washington, and over which the State courts have exclusive and original jurisdiction (R. 18).

(4) The Complaint fails to state a claim upon which relief can be granted (R. 18).

The Fifth Defense sets forth the fact that the appellant has now pending before the Indian Claims Commission of the United States a claim against the Government for the taking of the same lands herein involved, and attached to the Answer is "Defendant's Exhibits 2 and 3" (R. 18-19).

The Sixth Defense sets up the defense of the Statute of Limitations (R. 19).

The Seventh Defense sets up the defense of laches and estoppel (R. 19-20).

The Eighth Defense alleges abandonment and relinquishment by the appellant of any rights which it may ever have had in said lands (R. 20).

The jurisdictional defenses as set forth in appellee's first, second and third defenses are the issues here directly involved.

The appellee served and filed its Motion for an Order for a Preliminary Hearing on the first four defenses above mentioned, as provided for by Rule 12(d) of the Federal Rules of Civil Procedure (R. 21-23) (R. 23-26).

Interrogatories were filed by appellee (R. 74-84) and answered upon order of Court (R. 86-90).

Request for Admission of Facts and of the Genuineness of Documents were served upon the appellant and filed (R. 84-86). The appellant filed no answer thereto, and so the statements therein made became the facts of this case. The Court heard the matter and entered its Order dismissing the plaintiff's action on the ground that the Court was without jurisdiction over the subject matter. (R. 95-96), and this appeal followed (R. 96-97).

Facts Admitted and Pertinent to Jurisdictional Issues

The appellee, in support of the allegations in its Answer, attached to its Answer Exhibits 1, 2 and 3. These have been forwarded to the Circuit Court separate from the Record (R. 101, Item 24).

The genuineness of all of these exhibits has been admitted by the appellant by its failure to answer appellee's Request for Admission of Facts and of the Genuineness of Documents (R. 84-86).

Exhibit No. 1

This is a compilation of certified copies of all patents, grants or conveyances of all of the properties involved from the United States Government to appellee's predecessors in title, except property still owned by the United States Government as public domain, and property still held by the State of Washington as school land.

Attached to this exhibit is a summary of the patents and grants, with the page and volume numbers where the original instruments are filed in the Auditor's Office of Lewis County.

Briefly, the number of these patents and the acts of Congress under which they were issued are as follows:

- A. PUBLIC LAND ACT (3 Stat. 566), passed by the Sixteenth Congress, Session I, Chapter 51, approved April 24, 1820, under which 23 patents were issued by the Government.
- B. HOMESTEAD ACT (12 Stat. 392), passed by the 37th Congress, Session II, Chapter 75, approved May 20, 1862, under which 77 patents and 3 applications were issued by the Government.
- C. RAILROAD LAND GRANT ACT.
 - 1. 13 Stat. 365. Passed by the 38th Congress, Session II, Chapter 217, approved July 2, 1864.
 - 2. 16 Stat. 378. Passed by the 41st Congress, Session II, Resolution No. 67, approved May 31, 1870.

6 patents were issued under these two acts.

3. 30 Stat. 597. Passed by the 55th Congress, Session II, Chapter 546, approved July 1, 1898. 2 patents were issued under this act.

4. 34 Stat. 197. Passed by Congress May 17, 1906. This was an extension of the indemnity provisions of the Act of 1898 above referred to. 2 patents were issued under this act.

D. ACTS INVOLVING INDIANS

1. 23 Stat. 96. Passed by the 48th Congress, Session I, Chapter 180, approved July 4, 1884. 3 trust patents were issued under this act.

2. 24 Stat. 388. Passed by the 49th Congress, Session II, Chapter 119, approved February 8, 1887. 2 trust patents were issued under this act.

E. SCHOOL LAND GRANTS

The Organic Act established the Territory of Washington, 10 Stat. 172 (1 Rem. Rev. Stat. 315), approved March 2, 1853.

The Enabling Act provided for the State of Washington, 25 Stat. 676, (Rem. Rev. Stat. 333), approved February 22, 1889.

F. PUBLIC DOMAIN STILL OWNED BY U. S. GOVERNMENT

The Federal Power Act, (16 U.S.C.A. 791-825r, pages 576 to 641, and as amended) provided for the disposition of these government lands.

After hearings before the Federal Power Commission, under Project No. 2016, a license was issued by the Commission to the appellee on November 28, 1951, to build these dams, which license was accepted and approved by the City as required under the act (R. 5).

The Commission further, in Section (B), Article 32, page 14, provides in part as follows:

“* * * The Licensee shall also pay to the United States such charges as may be specified hereafter for the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands, including transmission line right-of-way.” (R. 6).

From the foregoing, the undisputable facts are that all of the properties involved in the Cowlitz Project are embraced within the foregoing categories of properties and are shown on the maps forwarded to this Court by the lower Court as “Defendant’s Exhibit 1” (R. 101, item 24) save and except certain right of ways for transmission line purposes.

Note that nowhere in any of the categories of these properties involved does the appellant have accorded to it or reserved to it any rights in these lands or rights in connection with said lands.

Exhibit No. 2

“Exhibit 2,” attached to Defendant’s Answer, is a copy of the original Petition, verified on August 2, 1951, by Simon Plamondon, a member of the appellant’s tribe (R. 17).

In this Petition the appellant tribe makes claim against the United States Government under the authority of 60 Stat. 1050, et seq., Public Law No. 726, 79th Congress.

In Section II of this Petition, the appellant claims the lands and rights in all of Lewis, Cowlitz and Clarke Counties, and parts of Skamania, Wahkiakum

and Pierce Counties in the State of Washington (R. 75, Item 4; R. 86, Item 4).

The appellant alleges in this Petition that the:—

“United States continued to encourage the settlement of lands of said tribe by American settlers, made numerous grants of land to such settlers out of the lands of said tribe and forcibly removed the Cowlitz Indians from their lands, all without compensation to said tribe and its members.”

The appellant further alleges that the Tribe was deprived of its lands and rights in connection therewith, and asked damages of the Federal Government in the sum of \$60,000,000.00.

Exhibit No. 3

“Exhibit 3” is a copy of the Answer of the Government to appellant’s Petition above set forth as “Exhibit 2.”

The United States contends the tribe has no rights, and its claim should be denied under *Duwamish et al vs. United States*, 79 Ct. Cls. 530, (Cert. denied 295 U.S. 755).

The appellant has filed to date in this action affidavits of the following: Malcolm S. McLeod (R. 31); Isaac Ike Kinswa (R. 27); Sara Costama (R. 28); John Eyle (R. 71); Frank Thomas (R. 69); Dr. Herbert C. Taylor (R. 39); and Malcolm S. McLeod (R. 90).

It would unduly lengthen this brief to set out or discuss these affidavits in detail. It is sufficient to say that while very interesting reading, they have no bearing whatsoever upon the issues involved herein.

APPELLEE'S ABSTRACT OF THE CASE

For the sake of clarity and continuity, the appellee briefly sets forth its abstract or statement of the case.

Appellant's Contentions

As before stated, this is an action by the appellant, as a tribe of Indians, to enjoin the building of dams on its claimed properties by the appellee; to enjoin the issuance of bonds in connection therewith; and to recover damages against the appellee in the sum of approximately \$80,000,000.00

In other words, the appellant contends that it has superior title to all of the properties involved, over that of the appellee and the appellee's predecessors in title, including the original patentees and grantees from the Government, and is attempting in this action to try the title to these properties in a Federal court.

In a preliminary hearing on the jurisdictional defenses set up in the appellee's Answer (R. 17-18), the District Court held that the Federal courts had no jurisdiction and dismissed the action for lack thereof.

Questions Involved

Appellee submits that the questions involved in this appeal are those questions which were raised by the appellee in its Answer to the Complaint of the appellant and which were answered in the negative by the District Court (R. 17-18).

The question generally stated is as follows:

Does the Federal District Court have jurisdiction of the subject matter of any of the causes of action set forth in appellant's Complaint?

The specific questions involved are as follows:

1. Does the Complaint in this action show on its face, by a statement of legal and logical facts, that this suit is one which really and substantially involves a controversy based on the construction or application of the Constitution or some law or treaty of the United States.

2. Does this Court have jurisdiction over suits or claims based solely on aboriginal or Indian title in the absence of express congressional authority, or must such claims be filed and heard before the United States Court of Claims under the Indian Claims Act, 25 U.S.C. 70.

3. Does this Court have jurisdiction over the subject matter involving the parties to this action where the United States, under the authority of various acts of Congress, has by patents and grants divested itself and conveyed title to all of said lands and appurtenances to the predecessors in title of the appellee, save and except a small amount of lands still held by the United States as public domain and subject to disposition under the Federal Power Act.

ARGUMENT

Summary

Argument in Support of Order of Dismissal:

Federal District Courts are courts of limited jurisdiction and burden is on appellant to sustain its jurisdiction.

Appellant has no vested property rights within the "due process" clauses of the Constitution:

The Duwamish Case,

The Tee-Hit-Ton Case.

All rights appellant may have had have been extinguished by Congress.

Any rights appellant may now have are controlled by Federal Power Act.

Action to try title must be brought in county and under state law in which lands are located.

Argument in answer to appellant's argument:

Acts of appellee do not violate "due process" clauses of the U. S. Constitution.

No vested rights in appellant have ever been recognized by any acts of Congress and none exist.

Land grants reserved no rights to appellant.

Argument in Support of Order of Dismissal

The appellant in its Complaint, in all four causes of action, bases all of its rights claimed therein on its alleged aboriginal or Indian title to the land and rights in question. No treaty, no agreement or law involving any real controversy based on a Federal

question is pleaded as a basis for any of the rights claimed by the plaintiff.

Furthermore, the appellant, in all causes of action set forth in the Complaint, bases the jurisdiction of this Federal District Court on the sole grounds that the amount in controversy is over \$3,000.00, and that a "Federal" question is involved.

Federal District Courts are Court of Limited Jurisdiction and Burden is on Appellant to Sustain its Jurisdiction

It is universally conceded that the Federal District Courts of the United States are courts of limited jurisdiction.

In 54 Am. Jur., Sec. 6, page 665, it is specifically stated:

"The United States District Courts are courts of special or limited jurisdiction, as defined by acts of Congress. Only the jurisdiction of the United States Supreme Court is derived directly from the Constitution.

"Federal courts which are inferior to the Supreme Court have no jurisdiction except such as is conferred by act of Congress. Their powers and duties depend upon the acts which call them into existence, or subsequent acts which extend or limit their jurisdiction. They must look to the act creating them and defining their jurisdiction as the warrant of their authority, and cannot go beyond the statute and assert an authority with which they have not been invested by it, or which may be clearly denied to them. Their jurisdiction

must be strictly exercised within the provisions of the acts conferring it. It is for Congress to say how much of the judicial power of the United States shall be exercised by the subordinate courts it may establish from time to time.”

To the same effect see 54 ALR 10, page 671, and 1 Barron and Holtzoff, Federal Practice and Procedure, Section 21, page 39.

The Complaint must show by a statement of facts in legal and logical form that the suit is one which really and substantially involves a controversy based on the construction of or application of the Constitution or some law or treaty of the United States.

In 54 Am. Jur. Section 53, page 707, it is stated:

“The presence of a Federal question sufficient to confer jurisdiction must generally be disclosed by the complaint, by a statement of facts in legal and logical form such as is required in good pleading, showing that the suit is one which really and substantially involves a dispute or controversy as to a right which depends on the construction or application of the Constitution or some law or treaty of the United States. The essential facts averred must show, not as a matter of mere inference or argument, but clearly and distinctly, that a Federal question of that character is present in the suit. It may not be enough merely to allege that such a question exists in the case, or to make a mere formal statement that the suit arises under the Constitution and laws of the United States, particularly where it appears that such averment is not real and substantial, but is without color of right. A claim

must be alleged which rests on a reasonable foundation and which is something more than a mere colorable one. *The allegations of the complaint cannot be helped out by resort to the other pleadings, or by judicial notice.*" (Italics ours.)

If the jurisdiction of a Federal Court does not distinctly and affirmatively appear in the Complaint, the Court must dismiss the case unless the jurisdictional facts can and will be supplied by amendment.

54 Am. Jur., Sec. 140, page 771, states concerning this as follows:

"The jurisdiction of a Federal court must distinctly and affirmatively appear. If it does not thus appear, the court, upon having its attention called to the defect, or upon discovering it, must dismiss the case, unless the jurisdictional facts are supplied by amendment. District Courts are explicitly charged with the duty of enforcing their jurisdictional limitations."

Furthermore, the burden is upon the appellant, upon challenge being made, to sustain the jurisdiction of the court involved.

54 Am. Jur. Sec. 139, page 770, states:

"Whatever may have been the view taken by some early cases as to the burden of proof of jurisdiction being upon the defendant, it is now settled beyond question that where the Federal jurisdiction invoked by the plaintiff is challenged in any appropriate manner, the burden is upon him to sustain the jurisdiction. Thus, the burden of establishing the jurisdiction of the Federal court is upon the plaintiff throughout the case.

He should allege in his pleadings the facts essential to jurisdiction, and has no standing if he fails to make them; and if he does make them, an inquiry into the existence of jurisdiction may be had for the purpose of determining whether the facts support his allegation. * * *

Where the controversy is over rights in real property such as here, the fact that titles involved may have emanated from the Federal Government or the controversy involves construction of Federal statutes, does not vest the Federal District Courts with jurisdiction in the matter.

In 42 Am. Jur., Sec. 71, page 847, it is stated:

“* * * The mere fact that the title of the plaintiff comes from a patent or under an act of Congress does not show that a Federal question arises, and mere allegations to the effect that an adverse claim is based on an erroneous construction of a treaty do not necessarily present a case arising under the Federal Constitution, laws, or treaties, of which a Federal court has jurisdiction without diversity of citizenship. * * *

and in Section 70, page 846 of the same volume it is stated:

“It is the rule that the courts of a state must determine the validity of titles to land lying in the state, although such titles emanated from the Federal Government or the controversy involves construction of Federal statutes, and they can determine between individuals the priority or validity of conflicting titles under different grants from the same antecedent source. In all

such cases an appeal may be taken to the Supreme Court of the United States, but no branch of the Federal judiciary has been invested with original jurisdiction in such cases.” (Italics ours.)

The principles of law above set forth are also enunciated and adopted by the decisions of the United States Supreme Court.

In *Shulthis vs. McDougal*, 225 U.S. 561, 56 L. Ed. 1205, the Court on page 1211 states:

“A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise, as all titles in those states are traceable back to those laws. * * *”

In accord see *Taylor vs. Smith*, 167 Fed. (2d) 797; *Shoshone Mining Co. vs. Rutter*, 177 U.S. 505, 44 L. Ed. 845 (865);

Little York Gold-Washing & Water Co. vs. Keyes, 96 U.S. 199 (203) 24 L. Ed. 656 (658).

In Section 10, page 33 of 12 ALR (2d), the further point is made that where a Federal question is raised that has been decided by previous decisions of the Federal Supreme Court so as to foreclose the subject, then

it is not a substantial Federal question involved sufficient to vest the jurisdiction of the court thereof. This statement is there made:

“A Federal question averred may be plainly unsubstantial because its unsoundness so clearly results from the previous decisions of the Federal Supreme Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy. * * *”

Numerous cases are cited in the footnote to the above quotation, in support of the principle set forth therein. These cases generally support the proposition that where the Federal Supreme Court has settled a question adversely to the plaintiff's contention, that issue then ceases to be a controversy involving a Federal question.

It is submitted that under the principles of law universally stated and above set forth, the Complaint in this action does not on its face show that a real and substantial Federal question is involved, and for this reason alone the District Court is without jurisdiction of this suit.

Appellant Has No Vested Property Rights Within “Due Process” Clauses of the Constitution

As hereinbefore stated, the appellant's claimed vested rights, which it contends are protected by the “due process” clauses of the United States Constitution, are based solely on aboriginal or Indian title. Appellee contends such rights are not those rights com-

ing under the protection of these “due process” clauses. Aboriginal or Indian title is a mere right of occupancy and is not a vested property right.

In 27 Am. Jur. Sec. 24, page 555, it is stated as follows:

“It has been settled by repeated adjudications that the fee of the lands in this country in the original occupation of the Indian tribes has, from the time of the formation of this government, been vested in the United States. The Indian title as against the United States is merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they see fit until such right of occupation has been surrendered to the government. * * *”

The extinguishment of Indian title is entirely a question of governmental policy and is not open to contestation in judicial tribunals. 27 Am. Jur. Sec. 33, page 561.

There are many cases in the Federal courts that have decided and discussed various issues involving property rights of Indians, but there are two cases which have exhaustively analyzed and discussed these problems and have reconciled and interpreted many, if not the great majority of, the important cases dealing with these problems. For this reason these two cases are discussed and set forth herein at some length.

These cases are:

(1) *Duwamish et al Indians vs. United States*, 79 Ct. Cls. 530 (Cert. denied, 295 US 755), which was decided June 4, 1934; and

(2) *Tee-Hit-Ton Indians vs. United States*, 348 US 272, 99 L. Ed. 314, which was decided February 28, 1955, on a Writ of Certiorari to review a judgment of the United States Court of Claims (128 Ct. Cls. 82; 120 F. Supp. 202).

The Duwamish Case

The Duwamish case was brought before the U. S. Court of Claims under the authorization of 43 Stat. 886, chapter 214. There were nineteen Indian tribes as plaintiff in this action.

Five of the plaintiff tribes *were nontreaty Indians* and predicated their claim upon an unlawful taking of their tribal lands by the Government and the granting of the same to white settlers. (The appellants are nontreaty Indians and make the same claims.) (Italics ours.) In this case the Court, on page 597 and 598, states:

“Five tribes, the Upper Chehalis, the Muckle-shoot, the Nooksack, the Chinook, and the San Juan Island Indians, living in or adjoining the territory involved in this case, *have never entered into a treaty with the United States*. The defendant interposes a defense as to their claims, stated in the brief as follows: (Italics ours)

“* * * the Government never having recognized that these tribes were the possessors of title in any degree to the land now claimed by them, they have no right thereto which can be litigated in this or any other court; that whether or not an Indian tribe has title to any particular section is dependent in the first instance upon sovereign

recognition and that until that recognition has been accorded by the sovereign the entire matter rests in the realm of politics and is not determinable in a court of law or equity.'

"The issue thus presented, so far as cited precedents are available, has not heretofore been presented to the court. It is, we think, an important one, not to be ignored. The five tribes mentioned were not included in treaties because of dissatisfaction with the proffered terms, and continued to reside upon certain lands and certain ones did receive contributions of funds from the Government. *Their claim now is that a vast extent of territory to which they claimed Indian title has been allotted and disposed of to white settlers by the United States, contrary to the Indians' wishes, to their injury and loss of a large sum of money.*" (Italics ours.)

Again, on page 598 to 600 inclusive, in the *Duwamish* case, it is stated:

"* * * No case has been cited, and a diligent research reveals none, where tribal Indians have been recognized as *sui juris* entitled to sue in the courts of the United States for the taking of lands claimed merely by the right of occupancy. It may not be contended that the right of the United States with respect to Indian tribal lands and funds is not supreme. 'No private individual,' as said in the case of *Buttz v. Northern Pacific Railroad Co.*, 119 U.S. 55, 66, 'could invade it, and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the Government, and are not open to contestation in the judicial tribunals.' " (Italics ours.)

“* * * Tribal Indians claimed by right of occupancy such vast and unlimited areas of lands, encompassing in many instances the greater and better portions of what are now States of the Union, *that had it ever been the political policy of the Government to accord them the same proprietary right that attaches to a title superior to that of occupancy, and open the courts to suits as and for their taking when thrown open to public settlement by the United States, Congress and the courts would have left open no doubts upon the subject.*” (Italics ours.)

“Indian special jurisdictional acts, of which there are many, exemplify the established rule that resort to the courts by tribal Indians has always been restricted to adjudication of treaty rights and losses suffered by acts of Congress with respect thereto. The cases are too numerous to cite. As said in *Lone Wolf vs. Hitchcock*, 187 U.S. 553, 568:

“ ‘In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of who, as we have held, were in substantial effect the wards of the Government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. *If injury was occasioned, which we do not wish to be understood as imply-*

ing, by the use made by congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained.’” (Italics ours.)

“See also *Beecher v. Wetherby*, 95 U.S. 517; *United States v. Rogers*, 4 How. 567.

“We are of the opinion that this court is without jurisdiction in a case between tribal Indians and the United States for the recovery of the alleged value of lands thrown open to public settlement by an act of Congress, in the absence of a treaty or an act of Congress recognizing the Indians’ title by right of occupancy to the same. The special jurisdictional acts do not confer such jurisdiction (*Mille Lac Indian case, supra*), and the issue is a political and not a judicial one.”

In speaking on the necessity of governmental recognition of Indian title to ascertainable land in order to base any claim thereon, the Court states on page 602 and 603 of the *Duwamish* case as follows:

“* * * We cite these facts as disclosing the absence of any governmental recognition of Indian title to ascertainable territory claimed by them by right of occupancy, and no claim is now preferred of a divestment of title to reservation lands by the defendant. The plaintiffs state that no reservation was set aside for these Indians; and ‘that acting under the friendly advice of an agent, thirty-three Indians took up homesteads on their tribal domain.’ *If this is the situation and the tribes in the past and up to the present have*

*failed to receive political recognition from the government and their right to any limited area of lands remains unrecognized, they remain in that status, for the correction of whatever inequalities or injustices prevail is for the determination of Congress and not the courts. To the extent of granting homesteads to the Indians the Government has exercised its political prerogatives; beyond this Congress has not gone, and we are convinced that no monetary liability exists because of an absence of such legislation. * * **"
(Italics ours.)

The Tee-Hit-Ton Case, supra

This case contains a thorough discussion of the principles involved in this case. Space will not permit setting forth at length the important principles therein laid down, but hereinafter set forth are the more important and significant statements. Page numbers are from L. Ed.

This case was brought by the plaintiff under the Fifth Amendment for compensation for the taking of certain timber alleged to be a part of the tribal lands.

On page 319 the problem is stated as follows:

"The problem presented is the nature of the petitioner's interest in the land, if any. Petitioner claims a 'full proprietary ownership' of the land; or, in the alternative, at least a 'recognized' right to unrestricted possession, occupation and use. Either ownership or recognized possession, petitioner asserts, is compensable. If it has a fee

simple interest in the entire tract, it has an interest in the timber and its sale is a partial taking of its right to 'possess, use and dispose of it.' *United States v. General Motors*, 323 US 373, 378, 89 L. Ed. 311, 318, 65 S Ct 357, 156 ALR 390. It is petitioner's contention that its tribal predecessors have continually claimed, occupied and used the land from time immemorial; that when Russia took Alaska, the Tlingits had a well-developed social order which included a concept of property ownership; that Russia while it possessed Alaska in no manner interfered with their claim to the land; that Congress has by subsequent acts confirmed and recognized petitioner's right to occupy the land permanently and therefore the sale of the timber off such lands constitutes a taking pro tanto of its asserted rights in the area.

"The Government denies that petitioner has any compensable interest. *It asserts that the Tee-Hit-Tons' property interest, if any, is merely that of the right to the use of the land at the Government's will. That Congress has never recognized any legal interest of petitioners in the land and therefore without such recognition no compensation is due the petitioner for any taking by the United States.*" (Italics ours.)

On page 320 of the *Tee-Hit-Ton* case it is stated:

"There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation.

Hynes v. Grimes Packing Co., 337 US 86, 101, 93 L. Ed. 1231, 1245, 69 S Ct 968.”

The Court on pages 320 and 321 of the *Tee-Hit-Ton* case as to Indian Title, states as follows:

“*Indian Title.* * * * That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised ‘sovereignty,’ as we use that term. *This is not a property right* but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.” (Italics ours.)

The Court, in this case in quoting from *Beecher vs. Wetherby*, 95 U.S. 517, 24 L. Ed. 440, in respect to the rights of the Indians and the right of the government to take their lands, states:

“‘* * * Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government.’ P. 525.”

The Court further, on page 321, states as follows:

“In 1941 a unanimous Court wrote, concerning Indian title, the following:

“*‘Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues.’ United States v. Sante Fe Pacific R. Co., 314 US 339, 347, 86 L. Ed. 260, 270, 62 S Ct 248.*” (Italics ours.)

The Supreme Court further in this *Tee-Hit-Ton* case, after discussing various decisions and interpreting the language used therein, on page 323, states:

“* * * *This leaves unimpaired the rule derived from Johnson v. M’Intosh that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment.*

“*This is true, not because an Indian or Indian tribe has no standing to sue or because the United States has not consented to be sued for the taking of original Indian title, but because Indian occupation of land without government recognition of ownership creates no right against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law.*” (Italics ours.)

Footnote 21 on page 325 of the *Tee-Hit-Ton* case *supra* in reference to the right of the government to extinguish original title without compensation states:

“The Departments of Interior, Agriculture and Justice agree with this conclusion. See Committee

Print No. 12, Supplemental Reports dated January 11, 1954, on HR 1921, 83d Cong.—Sess.

“Department of Interior: ‘That the Indian right of occupancy is not a property right in the accepted legal sense was clearly indicated when United States v. Alcea Band of Tillamooks 341 US 48, 95 L. Ed. 738, 71 S Ct 552 (1951) was reargued. The Supreme Court stated, in a per curiam decision, that the taking of lands to which Indians had a right of occupancy was not a taking within the meaning of the fifth amendment entitling the dispossessed to just compensation. (Italics ours.)

*“ ‘Since possessory rights based solely upon aboriginal occupancy or use are thus of an unusual nature, subject to the whim of the sovereign owner of the land who can give good title to third parties by extinguishing such rights, they cannot be regarded as clouds upon title in the ordinary sense of the word. * * *’ ” (Italics ours.)*

*“Department of Agriculture: ‘We also concur in the belief which we understand is being expressed by the Department of the Interior that no rights presently exist on the basis of aboriginal occupancy or title. * * *’*

“Department of Justice: ‘Thus, there is no legal or equitable basis for claims or rights allegedly arising from “aboriginal occupancy or title.” ’ ’ ”

The Supreme Court of Washington, in *State vs. Towessnut* 89 Wash. 478 P. 154 Pac. 805, and in *State vs. Wallahee*, 143 Wash. 176, P. 254 Pac. 1083, has followed the same rules in respect to Indian or aboriginal title.

Appellee submits that, by the principles above laid down, Congress has the right to terminate and extinguish at any time and upon any terms that it sees fit, all Indian title or rights in said lands, and can do so without any claim for compensation, as such rights are not property rights vested in the Indians.

All Rights Appellant May Have Had Have Been Extinguished by Congress

Appellee contends that any rights that the appellant may ever have had have been long extinguished by the issuance of patents and grants by the United States under the several acts of Congress as hereinbefore set forth.

The United States had permanent title to the lands and rights in question and conveyed that title and those rights by the issuance of patents or grants to third parties.

In 42 Am. Jur., Sec. 10, page 792, it is stated:

“Congress is invested by the Federal Constitution with the power of disposing of, and making needful rules and regulations respecting, the public domain. Its power in this respect is without limitation, and has been considered the foundation on which the territorial governments rest.

* * *

And in Section 3, page 785, of this volume, it is further stated:

“The government and its grants are the true source of title to all lands in this country, and the

public lands of the United States are held by it, not as an ordinary individual or proprietor, but in trust for all the people of all the states. * * *

“The discovery of lands in the American continent, followed by actual possession, gave title to the government by whose subjects or by whose authority such discovery was made, not only against other European governments, but against the native Indian tribes. * * *”

The United States, by the issuance of patents and grants, divests itself of all title and rights in the land conveyed.

In 42 Am. Jur. Sec. 31, page 811, it is stated:

“A patent is the highest evidence of title, and with it passes all control of the executive department of the government over the title, and its subsequent destruction or the mutilation of its record, by such department, does not impair its validity. As a general rule, it is impeachable only for fraud or mistake, and in courts of law it is presumptive evidence of the true performance of every prerequisite to its issuance, including the payment of the consideration.”

In respect to grants, in Section 32, page 812 in this volume, it is further stated:

“Every act of Congress making a grant is to be treated both as a law and a grant, and the intent of Congress when ascertained is to control in the interpretation of the law. A grant of this character is at least equivalent to a patent; in some respects, it has been regarded as a higher evidence of title than a patent, since it is a direct grant of the fee by the United States. * * *”

The issuance of a patent or grant vests in the grantee all interest of the United States in everything within the meaning of the term "land."

42 Am. Jur. Sec. 35, page 814 and 815, states:

"In the legislation of Congress, a patent has a double operation. In the first place, it is documentary evidence having the dignity of a record of the existence of the title or such equities respecting the claim as justify its recognition and confirmation; in the next place, it is a deed of the United States. As a deed, its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possessed in the land. It passes only the title the government has, not only as it was at the time of the survey, but of the date of the patent. *It passes to the patentee all interest of the United States, whatever it may have been, in everything connected with the soil and in fact in everything embraced within the meaning of the term 'land,' including appurtenances, improvements, and crops growing thereon at the time of the grant.* * * * " (Italics ours)

In *United States vs. Alcea Band*, 329 U.S. 40, 91 L. Ed. 29, the Supreme Court of the United States, on page 35 (L. Ed.) states:

"As against any but the sovereign, original Indian title was accorded the protection of complete ownership; but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will. *Termination of the right by sovereign action was complete and left the land free and clear of Indian claims.* Third parties could not

question the justness or fairness of the methods used to extinguish the right of occupancy. Nor could the Indians themselves prevent a taking of tribal lands or forestall a termination of their title. * * * ” (*Italics ours*)

See also in accord *U.S. vs. Minnesota*, 270 U.S. 181, 70 L. Ed. 539, and *Menominee Tribe of Indians case*, 95 Ct. Cl. 232, where the effect of the issuance of a patent by the United States Government is ably discussed.

Thus it is clear that the authorities all hold that when the Federal Government, by Congressional authority, issues patents of land or grants of land of the public domain to patentees or grantees, such patents or grants divest the United States of all rights and interest to all of the “lands” embraced in such patents and grants, and the patentee or grantee takes all rights held therein by the Government, save and except that which is expressly reserved in such patent or grant.

Appellee submits that all rights that the appellant may have had in any lands in question have been extinguished by the issuance of the patents and grants as hereinbefore set forth as a matter of law. The appellants have no property rights upon which the District Court can base jurisdiction.

Any Rights Appellant May Now Have Are Controlled By Federal Power Act

Appellee further submits that not only have all rights that appellant may ever have had been extinguished by Congressional action, but also that any

remaining rights which the appellant may conceivably have at the present time in these lands involved are wholly and completely subject to disposition by the Federal Government and under its sole control, under the terms and provisions of the Federal Power Act, 16 USCA, Sec. 791 to 825r.

Section 818 thereof specifically provides that from the date of the filing of the application for license, all lands owned by the Government and included in any proposed project shall be withdrawn from other disposal. Thus, any rights that the appellant claims it presently has are subject to the exclusive disposal and extinguishment thereof by the Federal Government under the terms of the Federal Power Act. The Supreme Court of Washington has recognized this power.

In *Tacoma vs. Taxpayers*, 43 Wn. (2d) 468, 262 P. (2d) 214, our Supreme Court on page 481 states:

“ * * * The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; ‘that the running water is a great navigable stream is capable of private ownership is inconceivable.’ Exclusion of riparian owners from its benefits without compensation is entirely within the Government’s discretion.”

Again, on page 489 it is stated:

“ * * * On the authority of those decisions, we must hold that Congress had the constitutional power to enact the Federal power act and that, in

doing so, it intended to exercise its full jurisdiction to authorize the power commission to supersede state laws purporting to prohibit or limit the construction of dams on navigable streams. By passing the act, Congress pre-empted the entire field and authorized the power commission to issue licenses for such construction upon such conditions as it deemed proper.”

Action to Try Title Must Be Brought in County and Under State Now in Which Lands are Located

It is further the contention of the appellee that both of the parties to this action are citizens of the State of Washington, and that this action is one which involves simply and solely questions as to the title to and the rights in lands located in Lewis County, Washington. The appellant is in no better position than any other citizen of the State of Washington, and must bring its action involving these lands against the appellant in Lewis County, in accordance with RCW 4.12.010 which provides that all actions for the determination of all questions affecting the title of, or for injuries to, real property must be commenced in the county in which the subject of the action or some part thereof is situated.

Furthermore, the Federal Courts have further universally held and enunciated the principle that the Federal District Courts must at all times be vigilant not to infringe upon the State Courts' jurisdiction and rights, and these principles are applicable to the case at bar.

In *Square D Co. v. United Electrical, Radio & Machine Workers of America*, 123 Fed. Supp. 776, the Court states on page 781 (3) as follows:

“Preservation of our federal system requires the federal courts to give due regard to the rightful independence of state governments by scrupulously confining their own jurisdiction to precise limits defined by statute. *Healy v. Ratta*, 292 U.S. 263, 270, 54 S. Ct. 700, 78 L. Ed. 1248; *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 67, 62 S.Ct. 15, 86 L.Ed. 47. Cf. *Silverton v. Rich*, D.C. Cal. 1954, 119 F. Supp. 434.”

In accord see also *Parissi v. General Electric Co.*, 97 F. Supp. 333 [(4) page 335]; and *Farson v. City of Chicago*, 138 F. 184, (pages 186 and 187).

In determining its jurisdiction over a particular case, such as the case at bar, the Court can and should when necessary examine all of the facts in the case bearing upon the question of jurisdiction, whether they be by affidavits or other evidence, and when the plaintiff cannot supply proof of its jurisdictional allegations the Court should dismiss the case for lack thereof.

See *McGhan v. F. C. Hayer Co.*, 84 F. Supp. 540, [(4) page 541]; and *Smith v. Sperling*, 117 F. Supp. 781, [(6) page 787].

ARGUMENT IN ANSWER TO APPELLANT'S ARGUMENT

Acts of Appellee Do Not Violate Due Process Clauses of the U. S. Constitution

The appellant apparently contends in its argument (Appellant's Brief pages 7 to 24), first that the appellee, in acquiring the property and rights in connection with the building of the dams, is taking the property of the appellant without compensation and that, therefore, this is a violation of the 14th Amendment to the Constitution of the United States, and, second, that the rights claimed by the appellant have been specifically recognized by the Congress of the United States.

Appellant, in support of its first contention, cites the following cases, to-wit: (Appellant's Brief, p. 4 and 5)

(a) *Portland Ry. Light & Power Co. v. City of Portland*, 181 F. 632, (Appeal dismissed, 218 U.S. 686).

(b) *Iron Mountain R. Co. v. City of Memphis*, 96 F. 113.

(c) *Cuyahoga River Power Co. v. City of Akron*, 240 U.S. 462, 60 L. Ed. 743.

(d) *Road Improvement District No. 2 v. Missouri Pacific R. Co.* 275 F. 600.

Consider first the alleged violation of the due process clause of the 14th Amendment. In considering this question, it must be remembered that in order to constitute such a violation the *State* must deprive the

defendant of "property" without due process of law. In other words, the acts of the appellee City must be such as to constitute the act of the State, and the rights of the appellant alleged to be taken or violated must be "property" in the sense as being under the protection of this amendment.

Where the acts complained of were forbidden by the State Legislature or not authorized by the State, it cannot be said that the acts were those of the State, for the purpose of the Fourteenth Amendment.

In *Seattle Electric Co. v. Seattle R. & S. Ry. Co.*, a case out of the Western District of Washington, in 185 Fed. 365, the Circuit Court on pages 369 and 370 stated in respect to this proposition as follows:

"These provisions have reference to state action exclusively, and not to any action of a private individual or corporation. It is the state that is prohibited from abridging the privileges or immunities of citizens of the United States, and from depriving any person of life, liberty, or property, without due process of law. * * * A municipal ordinance passed pursuant to the authority of the state which abridges the privileges or immunities of a citizen or deprives a person of property without due process of law may be therefore an act of the state prohibited by the Constitution. *But the ordinance to come within the prohibition of the amendment must, by implication at least, express the will of the state. It must be the act of the state. City of Louisville v. Cumberland Telephone & Telegraph Co.*, 155 Fed. 725, 729, 84 C. C. A. 151. * * * " (Italics ours)

In accord see *Snowden v. Hughes*, 132 F. (2d) 476 (478-479); *East St. Louis Ry. Co. v. City of East St. Louis*, 13 F. (2d) 852, [(3) page 853]; *Palestine Telephone Co. v. City of Palestine*, 1 F. (2d) 349, pages 349 and 350; *City and Town of San Francisco v. United Railroads*, 190 F. 507 [(1) (2) pages 510 and 511]; *Carolina and Northwest Ry. Co. v. Town of Lincoln*, 33 F. (2d) 719 [(15) page 721].

The appellant in its Complaint specifically alleges that the acts of the appellee, of which Complaint is made, are in direct violation of the laws of the State of Washington (R5 - Par VI X R11). Consequently, the unescapable conclusion must be that these acts of the appellee complained of are not the acts of the State and, therefore, not within the Fourteenth Amendment.

Furthermore, all of the rights claimed by the appellant as set forth in its Complaint are based solely upon Indian or aboriginal title. No other bases or rights are alleged. Such rights are not "property" rights protected by either the Fifth or the Fourteenth Amendments to the Constitution. (*Tee-Hit-Ton Case*, and footnote 21 thereto, *supra*.)

In the light of the foregoing discussion, let us examine the four cases hereinabove set forth and relied upon by the appellant.

1. *Portland Ry., Light & Power Co. v. City of Portland*, 181 F. 632, *supra*.

This was a suit involving the plaintiff's right of way. In that case it was undisputed that the plaintiff owned

a street car system as vested property, and used a right of way over private property. The order involved would overlap and encroach upon plaintiff's right of way or land. Plaintiff brought the action in Federal Court, alleging a violation of its property rights under the due process clause. It should be specifically noted that in this case there is no dispute but that the plaintiff owned the railway system, the land and buildings in connection therewith, the franchise and other properties of such a system. All of the properties are universally recognized as vested property rights and thus were about to be taken away by the defendant City Council acting as an arm of the "State." This is clearly that type of property right coming within the purview of the 14th Amendment.

In the present case the Complaint does not state any fact showing any such type of property rights in the plaintiff protected by the Constitution. The only rights alleged are aboriginal or Indian title, which are not such rights as protected by the Constitution. This Portland case is no authority for the principle for which it is cited by appellant.

2. *Iron Mountain R. Co. v. City of Memphis*, 96 F. 113.

This was a suit to enjoin the forfeiture of the alleged rights of the plaintiff under a contract made between the plaintiff and the taxing district, which was the predecessor in title to the defendant city. The undisputed facts in this case also are that the plaintiff owned property, both real and personal, comprising

a complete railroad system, together with the necessary franchise, all of which are recognized vested property rights. This case held that the action of the defendant city was the action of the state and, there being vested property rights concerned, the action was one within the operation of the 14th Amendment. This case, like *Portland Ry., Light & Power Co. vs. Portland*, supra, is no authority for the jurisdiction of this court in respect to the case at bar.

3. *Cuyahoga River Power Co. v. Akron*, 240 U.S. 462, 60 L. Ed. 743.

In this case the Supreme Court found that the action of the Council involved was under its authority from the State. Furthermore, that involved in this case were clearly vested property rights of the plaintiff which would be affected or taken by the act of the defendant. Based upon these findings, the Court held that the Federal Court had jurisdiction as a violation of the 14th Amendment. This case is also in the same category of the foregoing and has no bearing on the case at bar.

4. *Road Improvement District No. 2 v. Missouri Pacific R. Co.*, 275 F. 600.

This involved an assessment which was made against the plaintiff without any pretense of affording the plaintiff notice and an opportunity to be heard. Obviously this procedure was unconstitutional. This case is not in point in any respect upon the proposition under consideration herein.

**No Vested Rights in Appellant Have Ever Been
Recognized By Any Acts of Congress, and None Exist**

The other principal ground upon which appellant bases jurisdiction of the Court is the claim that vested property rights have been recognized in these lands by the Congress of the United States and the passage of certain acts. These acts are as follows:

The Northwest Ordinance of 1787, (App. Br. 6)
1 Stat. 50-51, Art. III.

The act establishing the Oregon Territory, (App.
Br. 6) 9 Stat. 329, Sec. 14; passed Aug. 14,
1848.

The Treaty Act of 1850, (App. Br. 11) 9 Stat.
437; passed June 5, 1850.

The Organic Act establishing the Territory of
Washington, (App. Br. 11) 10 Stat. 172, Sec.
12, (Rem. Rev. Stat. 315) approved March 2,
1853.

The Enabling Act establishing the State of Wash-
ington, (App. Br. 6) 25 Stat. 676, Sec. 4 (1
Rem. Rev. Stat. 331) (1 RCW 31); approved
Feb. 22, 1889.

Washington State Constitution, Art. XXVI,
adopted November 11, 1889. (App. Br. 11).

The pertinent portions of these acts are as follows:

1. *The Northwest Ordinance of 1787*, supra.

Article III, page 52, states:

“ * * * The utmost good faith shall always be
observed towards the Indians; their land and
property shall never be taken from them without
their consent; * * * ”

2. *The Act Establishing the Oregon Territory*, supra.

Section 14 thereof incorporates by reference the Northwest Ordinance of 1787 above set forth. The Act, in Chapter CLXXVII, states in part:

“ * * * Provided, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or *to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law or otherwise*, which it would have been competent to the government to make if this act had never passed. (Italics ours.)

Section 12 prohibits the building of dams on salmon streams without certain protection to the salmon.

Section 20 grants sections Nos. 16 and 36 in each township for school purposes.

3. *The Treaty Act of 1850*, supra.

This act authorized the President to appoint one or more commissioners to negotiate treaties with the various Indian tribes in the Oregon Territory, and provided for their pay. This was not a mandatory but a permissive act.

4. *The Act Establishing the Territory of Washington*, supra.

This was an act which established the territorial

government of Washington. This act defined its boundaries and contained the following provision :

“ * * * Provided, That nothing in this act contained shall be construed to affect the authority of the government of the United States to make any regulation respecting the Indians of said Territory, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never been passed ; * * * ”

Section 12 thereof provides :

“And be it further enacted, That the laws not in force in said Territory of Washington, by virtue of the legislation of Congress in reference to the Territory of Oregon, which have been enacted and passed subsequent to the first day of September, eighteen hundred and forty-eight, applicable to the said Territory of Washington, together with the legislative enactments of the Territory of Oregon, enacted and passed prior to the passage of, and not inconsistent with, the provisions of this act, and applicable to the said Territory of Washington, be, and *they are hereby, continued in force in said Territory of Washington until they shall be repealed or amended by future legislation.*” (Italics ours.)

Section 20 contained the same grant of Sections 16 and 36 in each township for school purposes.

5. *The Enabling Act Establishing the State of Washington, supra.*

This act provided in part :

“That the people inhabiting said proposed states

do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States”;

6. *Washington State Constitution, Art. XXVI, supra.*

This act contained the identical paragraph above quoted from the Enabling Act.

The appellant contends that the provisions of the acts set forth recognize and vest in the plaintiff Indian title to all of the lands involved in the Cowlitz project and involved in this case.

Congress, in forming the various territories out of the vast public domain existing in early days, provided generally for the initial government of the territories so set up, and these provisions were usually set forth in general language in the act creating the territory.

Thus, when the Oregon Territory was created by the act of August 14, 1848, Congress incorporated as a part thereof the old Northwest Ordinance of 1787 as a matter of general policy or guidance to be followed in the relationships with the Indians, these policies and provisions of the territorial acts being subject to later change or modification by subsequent acts of

Congress, the same as other laws. Certainly it was never intended that by these broad policy provisions contained in these acts that the Congress of the United States irrevocably recognized and vested Indian or aboriginal title to the Indians in all of the properties within the vast scope of the Oregon Territory, and which rights under no circumstances could be modified or changed by subsequent acts of Congress or by treaty.

Furthermore, the plaintiff surely does not also contend that Section 12 of the Oregon Territorial Act, which prohibits building of dams, is still in full force and effect and that all dams built since August 14, 1848, and located in the territory comprising the old Oregon Territory, are still subject to the provisions of this old section, notwithstanding the subsequent acts of Congress regulating such dams and including the Federal Power Act, 16 USCA Sections 791 to 825r. (App. Br.)

When Congress in 1853 passed the Organic Act establishing the Territory of Washington, which carved this Washington Territory, which later became the State of Washington, out of the original Oregon Territory covered by the Act of 1848 above mentioned, it specifically provided that as to this new Territory of Washington, only those laws of Congress passed subsequent to September 1, 1848, should apply. (Sec. 12, *supra*.)

Thus, it is obvious that all of the laws and the provisions relied upon by the appellant governing the

Territory of Oregon were passed prior to September 1, 1848, and consequently were no longer the laws applicable to the Washington Territory. The Act of 1853 which set up the Washington Territory in itself contained all of the provisions relating to this territory, and it should be specifically noted that the provisions in respect to the control of dams, contained in Section 12 of the Oregon Territory Act of 1848, was entirely omitted. The only provision then remaining in respect to the Indians' rights was the provision contained in Section 1 of the Washington Territorial Act above quoted. Certainly this provision did not in any respect recognize or vest in the appellant or any other Indians within the Washington Territory, Indian or aboriginal title to their tribal lands. This provision of the act simply and clearly reserved to the United States its former control over the Indians and their rights within the Washington Territory.

Neither does the enabling Act of 1889, under which the Washington Territory became the State of Washington, recognize or vest any Indian title or rights to any land in the appellant. The provision of this act above set forth again simply saved to the Indians and to the United States their respective rights and relationship that existed prior to the passage of this act. Their rights were the same as if this act had never been passed. It neither gave nor did it take from the government or from the Indians any rights not previously taken or given.

When the Constitution of the State of Washington was adopted, in Article XXVI thereof the same rights

of the Indian and of the United States were acknowledged. This provision again neither gave nor deprived the appellant of any rights in the lands within the State.

The appellant seems to argue (App. Br. 11, 16-17) that because the Congress of the United States, in the Treaty Act of 1850, authorized its representative to negotiate treaties with certain tribes of the northwest Indians, which would include the plaintiff tribe, that this in itself immediately vested and endowed the plaintiff with irrevocable Indian or aboriginal title, constituting vested rights and a legal encumbrance upon all the lands herein involved. (App. Br. 16-17.)

This act nowhere recognized or vested any rights in the Indians. It simply authorized a representative of the United States to negotiate and if the proper terms could be agreed upon to make a treaty subject to ratification by Congress.

The position of the appellee in this respect is well supported by the case of *Duwamish et al Indians v. United States*, 79 Ct. Cls. 530, (Cert. denied, 295 US 755, *supra*), which case has been heretofore fully discussed in this brief.

Please note that this Duwamish case involved several Indian tribes as plaintiffs, five of which were in the same category as the appellant—that is, non-treaty Indians—irrespective of the statement made by appellant on page 18 of its brief to the contrary. These non-treaty Indians were claiming compensation from the United States for the alleged unlawful taking of

their tribal lands—lands which were a part of the old Oregon Territory and of the Washington Territory, lands covered by the acts of Congress above set forth, lands of the same type and category as here involved.

Such claims were denied in that case. These are the identical facts here, and the same results must necessarily follow.

Furthermore, Congress, on March 3, 1871 (16 Stat. 566) 25 USCA 71, page 34, passed an act prohibiting the further making of new treaties with Indian tribes.

Thus, it is submitted that by the passage of the Treaty Act of 1850 Congress certainly did not intend to irrevocably vest in the Indians vested property rights which could never be changed by subsequent acts of Congress.

Land Grants Reserved No Rights to Appellant

Appellant further contends that the land grants made by the United States involved herein were made subject to and reserved to the appellant its Indian title; that such constituted vested rights and was an encumbrance upon the lands involved herein, and the taking thereof, it is alleged, is a violation of the due process clauses of our Constitution and appellant cites in support of its contention *United States vs. Santa Fe Railway Co.*, 314 U.S. 339 (App. Brief p. 20-24).

Very briefly, these land grants were made to the Northern Pacific Railway Company for the purpose of aiding the company in the building of the railroad. This road was to extend from Lake Superior to Puget

Sound on the Pacific Coast, and necessarily ran through many states and territories and undoubtedly crossed various Indian reservations or tracts of land in which Indian rights had been definitely recognized and which remain unextinguished.

It was anticipated further that some time would elapse between the time of the passage of the act in 1864 and the actual granting of the patents. As a matter of fact, the ten patents issued under the Railroad Act were issued during the period of 1894 to 1933, involving the lands herein concerned. (Ex. 1 annexed to App. answer - R 101, item 24.) The act, therefore, simply provided that where these recognized Indian rights did exist, the United States would extinguish those rights.

On page 21 of Appellant's Brief is set forth the provision of the grant act involved in the Santa Fe case. It should be noted that the act specifically calls for the extinguishment of Indian rights and "only by their voluntary cession." Furthermore, in this case Indian title and rights had been definitely recognized by the United States. This is not true in the case at bar.

The fallacy of the plaintiff's argument in this respect is the false assumption that at the time of the passage of the railroad acts of July 2, 1864, making these grants to the Northern Pacific Railroad Company, it had Indian title and rights to the land granted, and that such rights had been definitely recognized as vested property rights by the United States. This is not true. This act was passed after the territory of the

plaintiff had been opened to settlement by the Public Land Act of 1820, the Oregon Donation Act of 1850, the Homestead Act of 1862, and the acts extending the Homestead to Indians, and after the school land grants contained in the Organic Act establishing the Territory of Washington in 1853.

Thus, since the plaintiff had no rights or interests in these lands granted to the railroad companies, there were none to extinguish; and, in any event, the passage of this act itself and the issuance of the patents without specific reservation, constituted in itself an extinguishment by the United States of any claimed rights that the Indians may have had in this land.

Furthermore, it should be noted that in the *Santa Fe case* the United States was a party plaintiff and clearly it was a case within the jurisdiction of the Federal Court. This is not the case here.

It is submitted without further argument that the provisions in these railroad grant acts and in the school land grants simply preserve to the Indians and to the United States any rights and all relationships had between the two that existed prior to the passage of these acts, and that these acts neither granted nor took away any of these rights and in no way changed the relationship existing between the Indians and the United States.

CONCLUSION

In conclusion the appellee respectfully submits to this Court that the order of the Federal District Court, dismissing the appellant's causes of action heretofore

entered and on file in said cause (R3-13), should be affirmed and with costs taxed against the appellant as by law provided, on the grounds that the Court has no jurisdiction of this cause for the following reasons, to-wit:

1. There is no Congressional recognition of any title or rights whatsoever in the appellant to any of the lands or rights in connection therewith involved in this project, and no specific authority for the appellant to sue for the violation of any of these alleged rights has been recognized in any manner whatsoever by the Government.

2. Because all of the appellant's claims are based solely on aboriginal or Indian title and the issues raised herein are political and not judicial.

3. Because the allegations of the Complaint do not show that this action is one arising under the Constitution or laws of the United States or otherwise within the jurisdiction of the Federal Courts. Issues raised by a litigant that have been decided adversely by the Supreme Court of the United States are settled questions and a subsequent litigant cannot raise those same issues and base the jurisdiction of his cause of action thereon on the basis that said issues involve a Federal question. The naked assertion that a Federal question is involved is not sufficient.

4. Because the appellant has no rights, either legal or equitable, that are enforceable herein. Any rights that the appellant may have had in the past, based on its aboriginal or Indian title, were extinguished many, many years ago by the issuance of patents and

grants authorized by acts of Congress, copies of which patents and grants are on file herein. The remaining land which is involved in this project in which the appellant claims rights by this action is owned by the Federal government. Any rights that the appellant may have had in these lands were extinguished and terminated by the granting of a license to build these dams to the defendant under the authority of the Federal Power Act and the provisions in respect to public lands contained therein.

5. That the Congress of the United States has specifically granted to the appellant and to all other Indians or Indian tribes having any claim for a violation of their Indian title or rights in connection therewith, the right and the privilege to litigate and determine those claims before the Indian Claims Commission. The appellant's exclusive remedy for the violation of any such claimed rights is before the Indian Claims Commission, which course the appellant, as a matter of fact, is pursuing as particularly shown by appellee's Exhibits "2" and "3" annexed to appellee's Answer.

6. That this action between the citizens of the State of Washington, and the issues involve solely the title and rights to land located wholly within Lewis County, Washington, and over which the State courts have exclusive and original jurisdiction.

Respectfully submitted,

MARSHALL McCORMICK
ROBERT R. HAMILTON

By
Attorneys for Appellee



United States Court of Appeals For the Ninth Circuit

COWLITZ TRIBE OF INDIANS, *Appellant*,

vs.

THE CITY OF TACOMA, a Municipal Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

THE HONORABLE GEORGE D. BOLDT, *Judge*

REPLY BRIEF OF APPELLANT

MALCOLM S. McLEOD
861 Dexter Horton Bldg.
Seattle 4, Washington

JAMES E. SAREAULT
Bush Building
Chehalis, Washington

FREDERICK PAUL
755 Dexter Horton Bldg.
Seattle 4, Washington
Attorneys for Appellant.

VINCENT ABBEY
904 Arctic Building
Seattle 4, Washington

THOMAS TWOHIG
70A Fremont Extension
Seaside, California
Of Counsel.

FILE

JAN 16 1957

PAUL P. O'BRIEN, C

United States Court of Appeals For the Ninth Circuit

COWLITZ TRIBE OF INDIANS, *Appellant*,

vs.

THE CITY OF TACOMA, a Municipal Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

THE HONORABLE GEORGE D. BOLDT, *Judge*

REPLY BRIEF OF APPELLANT

MALCOLM S. McLEOD
861 Dexter Horton Bldg.
Seattle 4, Washington

JAMES E. SAREAULT
Bush Building
Chehalis, Washington

FREDERICK PAUL
755 Dexter Horton Bldg.
Seattle 4, Washington
Attorneys for Appellant.

VINCENT ABBEY
904 Arctic Building
Seattle 4, Washington

THOMAS TWOHIG
70A Fremont Extension
Seaside, California
Of Counsel.



INDEX

	<i>Page</i>
Argument	1
Indian Title in Washington State.....	2
Answering Appellee's Argument.....	3
Ownership of Water and Fishery.....	5
Railroad Land Grant Patents Expressly Except "Indian Title" and Except All of the River Bottom, River Course, and the Watershed Itself....	7
Table of Odd Sections Granted, Railroads "Less the River"	7, 8
Protection of Indians Under 25 USCA 177.....	9
Conclusion	10

CASES CITED

<i>Alcea Band v. U.S.A.</i> , 329 U.S. 40, 91 L.ed. 29.....	3
<i>Carter v. Hawaii</i> , 194 U.S. 154 (1904).....	6
<i>Cuyahoga Power Co. v. Akron</i> , 240 U.S. 462.....	1, 5
<i>Damon v. Hawaii</i> , 194 U.S. 154 (1904).....	6
<i>Duwamish v. U.S.A.</i> , 79 Ct. Cl. 530.....	2
<i>Muckleshoot Tribe v. U.S.A.</i> , Dkt. 98 Indian Claims Commission	2
<i>Nooksack Tribe v. U.S.A.</i> , Dkt. 46, Indian Claims Commission	2
<i>Otoe Missouri v. U.S.A.</i> , 131 Ct. Claims 593.....	2
<i>Pioneer Packing Co. v. Winslow</i> , 159 Wash. 655, 294 Pac. 557	6
<i>Raymond v. Chicago Union Traction</i> , 207 U.S. 20....	1
<i>Snohomish Tribe v. U.S.A.</i> , Dkt. 125, Indian Claims Commission	2
<i>Tacoma v. Taxpayers</i> , 43 Wn.(2d) 468.....	5
<i>Tee-hit-ton v. U.S.A.</i> , 348 U.S. 272, 99 L.ed 314.....	3
<i>United States as Guardian of Hualpai Indians v. Santa Fe R.R.</i> , 314 U.S. 339.....	4, 5, 6
<i>Walapai (Santa Fe) case</i> , 314 U.S. 339.....	4, 5, 6

STATUTES

Federal Power Act, 16 USCA 814.....	5, 9
Protection of Indiana, 25 USCA 177.....	9
Railroad Land Grant Act, 13 Stat. 365.....	7

	<i>Page</i>
Railroad Land Grant Act, 30 Stat. 597.....	7
Railroad Land Grant Act, 34 Stat. 197 and 30 Stat. 597	7
Rivers and Harbor Act, 16 USCA 797, Sec. 401.....	9
Washington State Enabling Act, 25 Stat. 676.....	3, 10

UNITED STATES CONSTITUTION

Fifth Amendment	4, 5, 9
Fourteenth Amendment	1, 4, 5, 9

WASHINGTON STATE CONSTITUTION

Article XXVI	10
--------------------	----

ORDINANCE

Ordinance City of Tacoma No. 14386 (R. 13-14).....	1
--	---

United States Court of Appeals

For the Ninth Circuit

COWLITZ TRIBE OF INDIANS	<i>Appellant,</i>	} No. 15211
vs.		
THE CITY OF TACOMA, a Municipal Corporation	<i>Appellee.</i>	

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

THE HONORABLE GEORGE D. BOLDT, *Judge*

REPLY BRIEF OF APPELLANT

ARGUMENT

The suit is for an injunction against the appellee who has taken property and rights of property from appellant without compensation and is presently proceeding to build two dams, which will destroy appellant's rights, under a Municipal Ordinance No. 14386 (R. 13-14) which is "State Action" under the 14th Amendment. See *Cuyahoga Power Company v. Akron*, 240 U.S. 462 at 464 (citing *Raymond v. Chicago Union Traction*, 207 U.S. 20, etc.). The appellee has failed to give any notice whatsoever of its unlawful seizure of the rights of appellant, which rights and lands cover several counties (R. 3, 86, 87) in the State of Washington, and this action is to enjoin this unlawful taking.

Appellant challenges appellee to cite one act, law, order, or regulation by Congress or a case in any other

forum which by its terms extinguishes the Indian Title of appellants to the Cowlitz River Watershed.

Indian Title in Washington State

Appellee cites the *Duwamish* case, 79 Ct. Cl. 530, and argues that because appellant is a Non-Treaty Tribe, it has no rights of property under this case. This court is requested to take judicial notice of the following cases in the State of Washington wherein a judgment of liability was obtained by the writer against the United States before the Indian Claims Commission based on "Indian Title":

<i>Non-Treaty Tribes</i>	<i>Judgment 1955</i>
<i>Nooksack Tribe v. U.S.A.,</i> Dkt. 46—	In excess of 100,000 acres
<i>Muckleshoot Tribe v.</i> <i>U.S.A. Dkt. 98—</i>	In excess of 100,000 acres
<i>Treaty Tribe</i>	<i>Judgment 1956</i>
<i>Snohomish Tribe v. U.S.A.</i> Dkt. 125—	In excess of 100,000 acres

That these judgments for "Indian Title" were sustained by the Supreme Court of the United States in *Otoe-Missouria v. U.S.A.*, 131 Ct. Claims 593 (certiorari denied) 76 S.Ct. 82. So appellee is somewhat at a disadvantage in citing the *Duwamish* case as authority for seizing appellant's property (Brief pages 21 and 48).

Out of the welter of Indian cases cited by appellee the issues between the parties as defined by the appellee, are as follows.

Answering Appellee's Contentions

The appellee's basic syllogism is:

1. Aboriginal rights are not protected by the Fifth Amendment, because the United States may deprive Indians of their aboriginally held property without compensation.
2. Therefore aboriginal rights are not protected by the Fourteenth Amendment and the City may deprive the Indians of their property rights.

The City glosses over the following authorities: *United States v. Alcea Band*, 329 U.S. 40, 91 L.ed. 29 at page 33, wherein the court stated:

"As against any but the sovereign, original Indian title was accorded the protection of complete ownership.";

Again, in the much vaunted *Tee-hit-ton Tribe v. United States*, 348 U.S. 272, 99 L.ed. 314 at pages 320-21, the court stated:

"This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties * * *."

Certainly, the State of Washington (and its subsidiaries) have no fee interest in the lands in general in the state, because the whole concept of the organization of the state was that the United States reserved all the lands in the state (with certain minor exceptions, *e.g.*, school lands) so that the Federal Government retained in *status quo* all prior rights, *e.g.*, the Olympic National Forest and Park. The Enabling Act establishing the State of Washington 25 Stat. 676.

We were amused at the inadequate discussion of the

Walapai (Santa Fe) case by the appellee. *United States as guardian of the Hualpai Indians v. Santa Fe*, 314 U.S. 339. We must first state that this case is a non-treaty case. Second, it is an aboriginal rights case. Third, the reservation was an executive order reservation, (and therefore, not a Fifth Amendment case) but even so, the decision applied to lands both inside and outside the reservation. Fourth, the aboriginally held *lands* survived the railroad patents. As to much of the lands here involved the City is the Grantee of the railroad. Ergo, the case is four-square an authority for appellants.

Appellee has ignored in OSTRICH FASHION, the holding of the United States Supreme Court in the *Santa Fe* case, *supra*:

1) "Occupancy necessary to establish aboriginal possession is a question of fact and is to be determined as any other question of fact" . . . (page 345)

2) "Nor is it true as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal governmental action" (page 347)

3) "But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian Wards." (page 354)

Once we conclude that the City is not the United States, then we must conclude the City may not also cavalierly dispossess the Indians. And to do so is to deprive the Indians of their right of occupancy without compensation in violation of the Fourteenth

Amendment. And so the Federal courts have jurisdiction under the *Cuyahoga* etc. cases.

We must discuss the Federal Power Act, 16 USC 791 *et seq.* First, it is designed to regulate the issue of whether a dam should be constructed. It is not designed to provide a forum to determine if some property owner, *e.g.*, a farmer, should be paid for having had his farm inundated. That is why 16 USC 814 gives the licensee a right of eminent domain, *i.e.*, the licensee must not only get a license but must also pay for damages to a property owner adversely affected. Therefore appellee is violating both the Fifth and Fourteenth Amendments.

Second, the Indians were not parties to the proceeding, though known to be exercising their rights on the property.

Third, the Power Act does not *ipso facto* extinguish Indian Title, as appears from the *Walapai* case, as follows:

“This court has consistently held that, in the absence of express language to the contrary, a Federal grant of public land does not constitute an extinguishment of Indian occupancy right.” 314 U.S. 339.

Ownership of Waters and Fishery

Fourth, a word should be said about *Tacoma v. Taxpayers*, 43 Wn.(2d) 468, wherein the court had difficulty in understanding that “running water in a great navigable stream is capable of private ownership * * *.” 43 Wn.(2d) 481. The incomparable Mr. Justice Holmes, for an unanimous court, had no such difficulty in

Damon v. Hawaii and *Carter v. Hawaii*, 194 U.S. 154. Exclusive fishing rights are not "monstrous to behold" or difficult to conceive."

"Occupancy [of land, of fishing rights, or of running water] is a question of fact to be determined as any other question of fact." *Walapai* (Santa Fe) case, 314 U.S. 339, 345.

On a motion to dismiss all of the allegations well pleaded are deemed true so the allegation in the Complaint that plaintiffs own the Cowlitz Watershed, the usufruct, the fishery, the land, and the water by virtue of aboriginal possession or Indian title clearly disposes of appellee's arguments.

The Supreme Court of the State of Washington has no difficulty in deciding that an Indian tribe is capable of the fish in a river. *Pioneer Packing Co. v. Winslow*, 159 Wash. 655 at 662, 294 Pac. 557:

"... we are of the opinion that in the present case the Quinault Indians own the fish in the Quinault River by the same title (Indian Title) and in the same right as they owned them prior to the time of the making of the treaty, and that the state has no right to interfere with or control their right to take fish from a stream which crosses the reservation."

While this case is distinguishable from the case at bar on the basis of the Treaty it is illustrative of the recognition of the extent and quality of aboriginal ownership or Indian Title.

Railroad Land Grant Patents Expressly Except "Indian Title" and Except All of the River Bottom, River Course, and the Watershed Itself

Referring this court to appellee's (Defendant's Exhibit 1, R. 101, item 24) sheet 1 of 13 it will appear that odd numbered sections were granted to the Northern Pacific Railroad "*less the river*" i.e., on sheet 1 of 13 (of Map) the odd numbered sections 27 and 29 are set out "N.P.R.R. Volume 4, page 9 *Section 21 LESS THE RIVER.*" See 30 Stat. 597.

A careful examination of the patents to the Railroads contained in appellee's exhibit to its Answer (R. 84-86) consisting of copies of all patents to the Railroads reveals that each patent excepts "Indian Title" and the river itself. Therefore, the "Indian Title" to the River itself has never been extinguished by any form of transfer whatsoever. See 13 Stat. 365 and 34 Stat. 197.

All of the patents described in Appellee's Answer (R. 84, 85, 86) except the water rights and therefore the Public Land, Homestead and Railroad patents have never extinguished appellant's "Indian Title" (appellee's brief, pages 6, 7, 8).

Table of Odd Sections Granted Railroads "Less The River"

Cursory examination of appellee's map Ex. No. 1 (R. 24, 25) and of all Railroad patents will show that all odd numbered sections abutting the river were conveyed "*less the river*" to Northern Pacific Railroad Co. and in addition to this exception each patent expressly reserves prior water rights:

Map Ex. No. 1 List of Odd Sections

<i>Proj. Map of</i>	<i>Less River</i>	<i>Map Page</i>
<i>Land Patents</i>	Sec. 9, 21, 29, all " <i>less the river</i> "..	1 of 13
"	" Sec. 9, 11, 3, all " <i>less the river</i> "....	2 of 13
"	" Sec. 3, 35 and 11 " <i>less the river</i> "..	3 of 13
"	" Sec. 1, 11, 7, all " <i>less the river</i> "....	4 of 13
"	" Sec. 9 and 7, all " <i>less the river</i> "..	5 of 13
"	" Sec. 11, 13, 23 and 15, all " <i>less the river</i> "	6 of 13
"	" Sec. 13 and 19, all " <i>less the river</i> "	7 of 13
"	" Sec. 33 and 29, all " <i>less the river</i> "	8 of 13
"	" Sec. 35 " <i>less the river</i> "	9 of 13
"	" Sec. 1, 11, 31, all " <i>less the river</i> "..	10 of 13
"	" Sec. 29, 31, 33, 5, all " <i>less the river</i> "	11 of 13
"	" Sec. 3, 11, 33, all " <i>less the river</i> "..	12 of 13
"	" Sec. 29, 33, all " <i>less the river</i> "	13 of 13

It will be noted on sheet 1 of 13 that the MAYFIELD DAMSITE is situated on parcels 9 and 11 in Section 29, which section was granted to the Northern Pacific Railroad by patent from the United States which patent excepted THE RIVER and all INDIAN TITLE. Therefore, this patent was issued to this section 29 "LESS THE RIVER" and the MAYFIELD DAM is being built by appellee across this river on land to which appellants are seized by reason of their aboriginal possession or title which was preserved by the patents. These patents also preserve all prior water rights so appellants have three separate and distinct bases for their title to the river and the Cowlitz water shed.

Appellee's acts interfere with appellant's use of their water rights on the river including interfering with their fisheries and their navigation of said river

under section 401 of the Rivers and Harbors Act, 16 USCA 797 and the Federal Power Act, *supra*, which is also a violation of due process under the 14th Amendment.

Protection of Indians 25 USCA 177

In reply to appellee's contention that all of appellant's rights have been extinguished and Congress intended to extinguish them by implication, 25 USCA 177 is cited:

“No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian Nation or Tribe of Indians, shall be of any validity in law or equity, unless the same be made by Treaty or convention entered into pursuant to the Constitution.”

Here appellee seeks to make an involuntary conveyance of appellant's Tribal Lands by (1) a taking without compensation or (2) a taking by eminent domain, which is in direct violation of the foregoing statute.

The taking of appellant's rights in the Cowlitz River and Cowlitz River Watershed violates this statute and is contrary to the Constitution and to the Fifth and Fourteenth Amendments thereto. It is interesting to note that the United States Army Engineers paid in excess of \$15,000,000 to the Yakima and Celile Indians for fishing rights on the Columbia River.

CONCLUSION

The District Court has jurisdiction where appellee seeks to deprive an Indian Tribe of its rights by denying the Appellant due process of law guaranteed under the 5th and the 14th amendments. Appellee is in no

better position than the ordinary shop keeper, the only difference is that the appellee is acting as a merchandiser of electrical power and is acting wholly in its proprietary capacity. Appellant's rights are spelled out under the exceptions in the patents and patent acts and the disclaimer in the Washington State Enabling Act, and the Washington State Constitution Article XXVI.

Respectfully submitted,

MALCOLM S. McLEOD

861 Dexter Horton Bldg.
Seattle 4, Washington

JAMES E. SAREAUT

Bush Building
Chehalis, Washington

FREDERICK PAUL

755 Dexter Horton Bldg.
Seattle 4, Washington
Attorneys for Appellant.

VINCENT ABBEY

904 Arctic Building
Seattle 4, Washington

THOMAS TWOHIG

70A Fremont Extension
Seaside, California
Of Counsel.

United States Court of Appeals

For the Ninth Circuit

COWLITZ TRIBE OF INDIANS, *Appellant*,

vs.

THE CITY OF TACOMA, a Municipal Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

THE HONORABLE GEORGE D. BOLDT, *Judge*

PETITION FOR REHEARING *EN BANC*

MALCOLM S. MCLEOD
861 Dexter Horton Bldg.
Seattle 4, Washington

JAMES E. SAREAULT
Bush Building
Chehalis, Washington

FREDERICK PAUL
755 Dexter Horton Bldg.
Seattle 4, Washington
Attorneys for Appellant.

VINCENT ABBEY
904 Arctic Building
Seattle 4, Washington

THOMAS TWOHIG
70A Fremont Extension
Seaside, California
Of Counsel.



United States Court of Appeals
For the Ninth Circuit

COWLITZ TRIBE OF INDIANS, *Appellant*,

vs.

THE CITY OF TACOMA, a Municipal Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

THE HONORABLE GEORGE D. BOLDT, *Judge*

PETITION FOR REHEARING *EN BANC*

MALCOLM S. McLEOD
861 Dexter Horton Bldg.
Seattle 4, Washington

JAMES E. SAREAULT
Bush Building
Chehalis, Washington

FREDERICK PAUL
755 Dexter Horton Bldg.
Seattle 4, Washington
Attorneys for Appellant.

VINCENT ABBEY
904 Arctic Building
Seattle 4, Washington

THOMAS TWOHIG
70A Fremont Extension
Seaside, California
Of Counsel.



INDEX

	<i>Page</i>
Petition for Rehearing <i>En Banc</i>	1
Certificate	6

TABLE OF CASES

<i>Coyahoga River Power Co. v. City of Akron</i> , 240 U.S. 462	1
<i>Duwamish v. United States</i> , 79 Ct. Cl. 530.....	3
<i>Iron Mountain, etc., v. City of Memphis</i> , 96 Fed. 113	1
<i>Lane v. Pueblo of Santa Rosa</i> , 249 U.S. 110.....	3
<i>Minnesota v. Hitchcock</i> , 185 U.S. 373.....	3
<i>Portland R. R. v. City of Portland</i> , 181 Fed. 632, 218 U.S. 686.....	1
<i>Tee-Hit-Ton v. United States</i> , 348 U.S. 272, 99 L.ed. 314	2, 3
<i>United Mine Workers v. Coronado</i> , 259 U.S. 344.....	2
<i>United States v. Santa Fe Pac. R. R. (Walapai case)</i> 314 U.S. 339.....	2



United States Court of Appeals

For the Ninth Circuit

COWLITZ TRIBE OF INDIANS

Appellant,

vs.

THE CITY OF TACOMA, a Municipal Corporation

Appellee.

No. 15211

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

THE HONORABLE GEORGE D. BOLDT, *Judge*

PETITION FOR REHEARING *EN BANC*

Appellant moves for a rehearing of this case and that the same be heard before the full Court *en banc* on the following grounds:

The holding of the Court in syllogistic form is:

1. Property rights are protected from appropriation by a state agency by the Fourteenth Amendment.

2. Aboriginally held Indian property (unprotected by treaty) is not of sufficient dignity to be called property.

3, Therefore, the Fourteenth Amendment does not prevent a state agency from inundating graves, fishing rights, etc., so held and the corollary that the Federal Courts have no jurisdiction under that theory follows.¹

¹The Fourteenth Amendment in and of itself is sufficient to confer jurisdiction, *Iron Mountain etc v. City of Memphis*, 96 Fed. 113; *Coyahoga River etc. v. City of Akron* 240 U.S. 462; *Portland R.R. v. City of Portland*, 181 Fed. 632, appeal dismissed 218 U.S. 686.

Stated in such a fashion (and we believe such is the holding of the Court) the foregoing is not logical, or in accordance with the law:

First, the *Walapai case*, 314 U.S. 339 (1941) is an aboriginal rights case. The aboriginal rights of the Indians survived the railroad grants by patents from the United States, *ergo*, such aboriginal rights have dignity, and are "property." It will not do to say it is an "executive order" case, because it concerned land both inside and outside the so-called reservation created by the executive order, and therefore is an "aboriginal rights" case.

Second, assuming that aboriginally held lands have dignity, then the Fourteenth Amendment prevents the City from dispossessing plaintiff.

Third, can the addition of the United States as a guardian enhance the dignity of the land-ownership rights of the Indians? Certainly a guardian has only such rights as its ward has. And so, the *Walapai case*, 314 U.S. 339, is more persuasive than ever, because, after all, the Indians prevailed.

Fourth, an Indian tribe is *sui juris*. Look at the *Tee-Hit-Ton case*, 348 U.S. 272, wherein plaintiff is described as an identifiable tribe of Indians, suing in the Court of Claims without a special jurisdictional act. Even the United Mine Workers, which to counsel's mind is the epitomy of an amorphous plaintiff, has standing in court, *United Mine Workers v. Coronado*, 259 U.S. 344.

Fifth, what do the phrases "this is not a property right but amounts to a right of occupancy which the

sovereign grants and *protects against intrusion by third parties* * * * ” mean in the *Tee-Hit-Ton* case (348 U.S. 272, 279) and the *Duwamish* case (79 C. Cl. 530, 599)? The Court should give us some explanation and we feel we are entitled to chide the Court for failing to do so.

On oral argument we called the Court’s attention to *Minnesota v. Hitchcock*, 185 U.S. 373, to show what the Supreme Court did in a conflict between what may be considered aboriginally-held lands on the one hand and school lands on the other. We have one new case which deserves consideration by the Court, namely, *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, wherein the tribe in its own right and without the aid of the United States as a party plaintiff protected its domain. True it is that one might disregard some of the language of the case and say that it is not an aboriginal rights case. but the quantum of property seems unimportant, as long as there is some quantum.

Sixth, we think it a novel doctrine that *res judicata* can be based and applied by the Court merely on filing a case in the Indian Claims Commission, and thereby foreclosing the Indians from taking an inconsistent position (assuming the allegations to be inconsistent) from such case.

Finally, we were disappointed in the failure of the Court in its opinion rationally to distinguish the phrases in the *Tee-Hit-Ton* and *Duwamish* cases and in the direct holding of the *Walapai* case, and now we add for the Court’s consideration *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110. Once we establish that In-

dian title gives some sort of a property right, then the Fourteenth Amendment must protect the same, and thus, the Federal Courts can and must take jurisdiction of the lawsuit based thereon. As a corollary of the Court's present opinion, we must anticipate that if we should file an action in the state courts, we would be dismissed out also, because if these Indians have insufficient rights to be protected under the Fourteenth Amendment (thereby conferring jurisdiction on the Federal Courts) then the fact of the insufficiency of their property rights is established and the City of Tacoma would have no need to compensate the Indians under any theory.

We believe the full Court should hear this case and that the lower Court be reversed and the opinion heretofore entered herein be withdrawn.

WHEREFORE, appellant prays for a rehearing and that the same be before the full Court *en banc*, that the lower Court be reversed and the opinion heretofore filed herein be withdrawn.

Respectfully submitted,

MALCOLM S. McLEOD
861 Dexter Horton Bldg.
Seattle 4, Washington

JAMES E. SAREAULT
Bush Building
Chehalis, Washington

FREDERICK PAUL
755 Dexter Horton Bldg.
Seattle 4, Washington
Attorneys for Appellant.

VINCENT ABBEY
904 Arctic Building
Seattle 4, Washington

THOMAS TWOHIG
70A Fremont Extension
Seaside, California
Of Counsel.

CERTIFICATE OF MERIT

The undersigned hereby certifies that he is a member in good standing of the Bar of this Court, and that the foregoing Petition is meritorious and not sought to delay this action.

FREDERICK PAUL





1975-1976



